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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 36.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

J. H. WHARTON, B. L. CAUGHMAN, AND JOHN H. EARLE, AS RAILROAD COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

MEMORANDUM BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

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This case comes before this court on writ of error to the Supreme Court of the State of South Carolina, to review a judgment passed by the latter court in a certain mandamus proceeding, wherein the Railroad Commission of the State of South Carolina had invoked the original jurisdiction of the State Supreme Court to enforce an order of said Railroad Commission issued on or about July 29, 1904, against the Atlantic Coast Line Railroad Company.

The order of the Railroad Commission is as follows:

> "On petition of the town authorities of the town of Latta and of Clio and citizens along the Latta Branch Railroad for the stopping of trains Nos. 32 and 35 on flag for receiving and delivering passengers at said station.
>
> "After personal inspection of the situation at Latta and the demand of said citizens for these accommodations, it appears to this board that sufficient accommodation was not furnished to these citizens to fulfill the requirements of the statutes of this State. The evidence was sufficient to warrant this board in demanding that better accommodation should be furnished, and that it was not unreasonable to ask the said company to stop trains Nos. 32 and 35 on flag.
>
> "Therefore, it is hereby ordered that said trains shall stop on flag at said Latta station on and after August 1st" (R., 71).

The receipt of a copy of this order was acknowledged by the general superintendent of the Atlantic Coast Line Railroad Company under date of August 30, 1904 (R., 72).

More than sixty days from August 1st, the date when said order was by its terms effective, having elapsed, and no provision having been made by the railroad company for the stoppage of said trains Nos. 32 and 35, as specified therein, said Railroad Commission filed its petition for a *mandamus* to enforce its said order (R., 9, 10) invoking to that end the provisions of section 2119 of the Code of Laws of South Carolina, revision of 1902, which reads as follows:

> "SECTION 2119. If any railroad company shall neglect or refuse to comply with the regulations of this chapter, or with the rules and regulations prescribed by said commissioners within the limits of their authority, such company shall be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or Circuit Court, upon application of the commissioners, or a majority of them, to require compliance with said laws or said rules and regula-

> tions, and failure to comply with said writ of mandamus shall be punishable as for contempt; and for any willful violation of any of said laws, or failure to comply with the requirements of such rules and regulations, the court may award such costs and counsel fees on the return of said writs, and after due deliberation thereon, as may be just."

In said petition the Railroad Commission alleged that the Atlantic Coast Line Railroad Company was a corporation *organized and existing under the laws of the State of South Carolina,* which operated a railroad from Wilson through the town of Fayetteville, in North Carolina, to Florence, in South Carolina, and also owned and operated the so-called Latta Branch Railroad; that certain citizens of South Carolina, residing at Latta and along the line of the Latta Branch Railroad, in said State, had alleged in a petition filed before said commission that said railroad company "was furnishing insufficient accommodations for passengers traveling on said railroad, and asking that the said railroad company be compelled to stop its passenger trains, numbers 32 and 35, at its station in the town of Latta when flagged for the purpose of receiving and delivering passengers at said station;" that said Railroad Commission, "after investigating the facts stated in said petition, and after notice to and hearing the said" railroad company in reference to the facts of said petition, found as a matter of fact "that sufficient accommodation was not furnished the citizens along the said Latta Branch Railroad and in the town of Latta" by said company, and had ordered "that the said passenger trains numbers 32 and 35, * * * should stop when flagged at the said Latta station on and after August 1, 1904;" that a copy of said order had been served upon said company more than sixty days prior to the commencement of this action, but said company had "neglected and refused to comply with the said order to stop said trains at said station for the purpose of receiving and delivering passengers."

On the filing of said petition one of the associate justices of said State Supreme Court laid a rule upon the Atlantic Coast Line Railroad Company requiring it to show cause "why a writ of mandamus should not issue, requiring that the trains mentioned in the complaint (namely, Nos. 32 and 35) be stopped at the defendant's station in Latta for the purpose of receiving and discharging passengers."

This rule as issued was returnable "at chambers" (R., 11).

Responding to this rule the defendant company filed a demurrer to the petition (R., 12, 13), and thereupon, by consent of counsel, an order was issued requiring the return to the rule to "be heard before the full court" (R., 12).

By its demurrer the railroad company asserted:

(1) That the Railroad Commission was without power to make the order, the violation of which was alleged as a cause of action.

(2) That the order of the Railroad Commission was not the result of a judicially determined fact, and that the defendant company, not having had its day in court on the merits of said order, the enforcement thereof would result in depriving defendant of its property without due process of law, contrary to section I, article 14, of the Constitution of the United States.

(3) That the Supreme Court of South Carolina was without jurisdiction to try the questions involved in the petition of the Railroad Commission, for reasons therein specified, but not necessary to be here enumerated.

(4) That while the petition of the Railroad Commission "sets forth that, as a matter of fact that sufficient accommodation was not furnished the citizens along the said Latta Branch Railroad and in the town of Latta," it does not state "as a fact that said accommodations do not exist," and

whether such be the truth is a matter of fact for judicial determination.

(5) That if it be within the power of the Railroad Commission to require the defendant company to give greater conveniences to a specific locality "this power does not embrace the right of the Commission to regulate this convenience by a control of the operation of specific trains" (R., 12, 13).

This demurrer was overruled (see opinion of the State court, R., 13-17) and the defendant railroad company answered the averments of the petition fully to the following effect:

(1) It denied that it was a corporation existing under the laws of the State of South Carolina, and averred that it was a corporation organized and existing under the laws of the State of Virginia.

(2) It admitted that a petition had been filed by certain citizens of the State of South Carolina "residing at the station of Latta, South Carolina," which petition was framed "solely for the purpose of requiring the defendant to stop its passenger trains Nos. 32 and 35 at the station known as the town of Latta, on flag;" but denied as said petitioners alleged in their said petition that the "Atlantic Coast Line Railroad Company was furnishing insufficient accommodations for passengers traveling on said railroad."

(3) It admitted that it was notified to appear before said Railroad Commission, but denied that it had had "such a hearing before the Commission, as is required by law, with the privilege of having witnesses sworn to testify against the reasonableness of the petition;" and it further denied "that the Commission found, as a matter of fact, that sufficient accommodation was not furnished the citizens along the

Latta Branch Railroad and in the town of Latta," at its said Latta station.

(4) It admitted that the Railroad Commission had made the order above quoted with respect to trains Nos. 32 and 35, but denied "that the finding of said plaintiff's railroad commissioners involved a finding of insufficient accommodation as alleged."

By way of affirmative defense, the defendant company further answered the rule as follows:

> "The defendant alleges that sufficient passenger accommodations are now furnished the citizens of Latta and those residing along the Latta Branch Railroad, so that in every respect of passenger travel they are furnished every reasonable facility; that in addition to a number of passenger trains of local character daily, there is also afforded them the convenience of a daily passenger train each way for through travel other than trains thirty-two and thirty-five; that trains thirty-two and thirty-five are known as the Florida and West Indian Limited trains, running between the cities of New York and Tampa, Fla., making a daily connection with steamship lines plying between Tampa, Fla., and Havana, Cuba; that said trains are primarily for the purpose of through passenger traffic, which cannot be accommodated otherwise; that said trains are engaged in the interstate transportation of passengers and United States mail through the States of New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida, with through connections at the city of New York and at Tampa, Florida, and intermediate cities with what is known as the wider traveling public that cannot be accommodated by defendant if these trains are localized; that the through travel, the carrying of United States mail and interstate commerce travel has grown to such an extent that it can only be accommodated by operation of the trains in question, running a very fast schedule, stopping at only neces-

sary points; that these trains are operated for this class of business, other trains affording ample accommodations and facilities for all other business; that the trains in question, now stopping only at necessary points, are run necessarily with a very fast schedule, in order to accommodate the business described, and if the trains are required to stop at Latta, S. C., and points similar to the station of Latta, S. C., the running time of these trains will be much lengthened, their usefulness for their primary object would be entirely destroyed, said trains could not be operated and the defendant company would be denied one of its principal sources of revenue and its ability to accommodate the business described; that the defendant operates these trains at a great expense, with every available modern equipment for the accommodation of through travel, and in its competition with other through (travel) lines in the business involved, must maintain their efficiency as to fast schedules and in other respects, and if these trains are interfered with by local legislation of the character involved and are required to stop at Latta, S. C., and similar points, the defendant will be unable to compete with other similar trains operated by competing lines and must abandon these trains and the business in question; that the trains in question are not regular passenger trains for carrying passengers from one point to another in the State of South Carolina, such traffic being amply provided for by other trains; that the trains in question are used exclusively for interstate traffic from and to points without the State of South Carolina, except such traffic as may be accommodated by the stopping of these trains at points necessary in their being operated for their primary purposes as interstate commerce trains; that these trains are not subject to regulation by the statutes of the State of South Carolina, or by its Railroad Commission, under the circumstances involved in the alleged cause of action, and to stop them, as prayed for, would impede and obstruct insterstate commerce and deny to plaintiff a rightful and judicious management of its property; that said order of the Railroad Commission of South

> Carolina is unreasonable, unnecessary, a direct burden upon interstate commerce, and therefore a violation of and conflict with section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce with foreign nations and among the several States, and further, that said order is a direct and unnecessary interference with the speedy carriage of mails of the United States" (R., 18, 19).

Upon the issues raised by the defendant's answer, and particularly with reference to those raised by this affirmative defense, the State Supreme Court, on motion of the Attorney General, entered an order referring the cause to a master:

> "To take testimony on all issues involved and report the same to this court, as soon as the convenience of all parties interested in the taking of said testimony will permit, and said referee is hereby empowered to report any special matter" (R., 20).

Under this order of reference the referee took and returned to the Supreme Court of the State a large amount of testimony, which is printed in full at pages 20 to 119, inclusive, of the Transcript of Record before this court. Subsequent to the report of the referee, the issues came on for hearing and determination before the Supreme Court of the State.

That court, in its so-called "statement of facts," refers to this testimony and quotes meagerly therefrom; but held that—

> "The facts were determined by a tribunal (the Railroad Commission) well recognized and adopted throughout the land. The defendant was notified to appear and contested the facts upon their merits."
>
> "As the facts were judicially determined by a tribunal (the Railroad Commissioners) empowered by statute to make such adjudication, they are not subject to review by this court, in the absence of allega-

tions charging fraud or other grounds for setting aside the adjudication."

"Therefore, the question to be determined is, whether the order of the commissioners, requiring the railroad company to stop at Latta (if flagged) its two fast mail trains engaged in carrying interstate passengers, was a burden upon interstate commerce, when the accommodations are otherwise inadequate."

"The mere fact that they are fast mail trains engaged in carrying interstate passengers, does not exempt them from regulation under the statute of the State" (R., 123).

Referring to the opinions of this court in Lake Shore Company *vs.* Ohio, 173 U. S., 285, and Cleveland, etc., Railroad Company *vs.* Illinois, 173 U. S., 285, and Same against Same, 177 U. S., 514, the State Court said that the Supreme Court of the United States had—

"recognized the principle that it is the duty of the railroad company to provide, *primarily*, sufficient accommodations for those to whom it is directly tributary."

"From this doctrine, it follows as a necessary corollary that it is only 'after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic.'"

"The facts judicially determined by the commissioners show that the accommodations are inadequate, and that the citizens of Latta are entitled to relief."

"In seeking to give relief, the commissioners have ordered trains Nos. 32 and 35 to stop when flagged."

"This court has reached the conclusion that the writ of mandamus should be issued; but in order that the respondent may have the opportunity of discharging its primary duty in the premises, without stopping trains Nos. 32 and 35 on flag, the writ will be so framed as to confer upon the railroad company the alternative right to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag."

> "It is the judgment of this court that the writ of mandamus be issued in accordance with the conclusions herein announced" (R., 125, 126).

To review the conclusions so expressed by the State Supreme Court in its opinion, and made effective by its judgment, the defendant company promptly filed a petition for rehearing, which petition, among other things, stated its position upon two points involved in the controversy, as follows:

> 1st. "If it is the primary duty of the railroad company to provide for local accommodations, and if it is the secondary duty of the railroad company to provide for interstate commerce accommodations, it cannot but be contended that these two duties, denominated 'primary' and 'secondary,' are of equal importance, * * * and that it is equally the duty of the railroad company to provide for both, even if one be termed 'primary,' and the other 'secondary.' * * * That the primary duty of providing for the local traveling public is wholly within the domain of State authority, and that the secondary duty of providing for interstate commerce travel is wholly with the interstate commerce authority; and in enforcing either the primary or secondary duty, neither the State authority nor the interstate commerce authority can invade the jurisdiction of the other. * * * We do not question the power of the Railroad Commission, through its orders, *the State Court controlling these orders upon their merits,* to enforce adequate local accommodations at Latta; but inasmuch as these adequate accommodations can be required without invading the domain of interstate commerce, it is the duty of the State authority to require these adequate accommodations (to be furnished) without destroying accommodations which are afforded interstate commerce travel, the regulation of which is exclusively within the domain of Congressional authority" (R., 127).
>
> 2nd. "If a local statute or the order of a railroad commission (acting under authority of the local

> statute) can control the operation of interstate commerce trains" * * * "the fact of inadequate performance of the local duty must be determined by due form of law, and * * * such fact in this case has never been ascertained, much less ascertained by due form of law" (R., 127, 128).

This petition for a rehearing was overruled (R., 137), and thereupon the writ of mandamus was issued in the following terms:

> "Now, therefore, that due and speedy justice may be done, you the defendant, the Atlantic Coast Line Railroad Company are hereby commanded that you the said Atlantic Coast Line Railroad Company do immediately after the receipt of this writ stop your passenger trains Nos. 32 and 35 at your station in the town of Latta, when flagged, for the purpose of receiving and delivering passengers at said station, with the alternative right on your part to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35, on flag; and that you do pay the costs and disbursements of this proceeding to be taxed by the clerk of this court, and in what manner this writ shall have been executed you make appear to said Supreme Court, and there returning this writ."

To review this mandatory order of the Supreme Court of the State of South Carolina the writ of error before this court was sued out.

The plaintiff in error contends that the judgment complained of should be reversed:

1st. Because it constitutes a direct and positive burden upon interstate commerce, and hence was beyond the jurisdictional powers of the State Supreme Court. (Section 8, article 1, of the Constitution of the United States; assignments of error 8, 9, 10, and 11.)

2nd. Because the refusal of the Supreme Court of the State of South Carolina to consider the evidence taken before the referee appointed under its order, with respect to the sufficiency of accommodations at Latta for the local and through passenger traffic, amounted to a denial of the right on the part of the defendant railroad company to demonstrate the sufficiency of such accommodations before being required to stop at Latta, specific trains which were especially designed and operated for the accommodation of through interstate traffic, thus constituting a deprivation of property without due process of law contrary to the prohibitions of section 1, article 14, of the Constitution of the United States; assignments of error 1, 2, and 6.

3rd. That the judgment of the said Supreme Court being in the alternative, namely, to stop passenger trains Nos. 32 and 35, when flagged, or "to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35, on flag," amounts to an attempt on the part of the court to exercise, under the guise of a judgment, both judicial and legislative functions, which cannot legally be done. To require the stopping of specific trains upon facts judicially ascertained to warrant such stoppage is a judicial function. To require the furnishing of specific facilities, when such facilities are not required by any statute or other legislative order, is a legislative function. Where, as in this case, the effect of the legislative provisions of the judgment is to either interfere with or provide for interstate commerce or interstate transportation, it is a clear invasion of the legislative powers of the Congress of the United States, and void under the provisions of section 8, article 1, of the Constitution of the United States, and the enforcement of the judgment of a State court requiring, in general terms, the furnishing of additional transportation facilities by an interstate carrier in the absence of legislative authority or provision therefor,

would amount, in so far as the defendant was concerned, to a deprivation of property without due process of law.

In this case the main question is whether the order of the Railroad Commission as interpreted and ordered to be enforced by the Supreme Court of South Carolina, is valid with reference to the provisions of the Constitution of the United States, and this depends upon the question, first whether the result of the enforcement of said order will constitute or amount to a mere incidental interference with interstate commerce, based upon a legal exercise of the police powers of the State, and second whether in any event its enforcement will result in a deprivation of property without due process of law.

Admitting for the purposes of argument that a State Railroad Commission, when duly authorized by statute so to do, has the power to compel an interstate carrier of passengers, mail, and express to stop its fast interstate trains at specified towns or cities in which it maintains depots or stations, if said company has not made proper and adequate provision by other trains for both the local and interstate travel to and from said towns or cities, it is nevertheless certain that if said railroad company has furnished all proper and adequate or reasonable accommodations to said towns or cities then any interference with the interstate trains of said company, either directly by statute, or by order of a Railroad Commission claiming to act under authority of a statute, will be illegal, and constitute a violation of the commerce clause of the Federal Constitution.

> "In reviewing statutes of this nature, and also orders made by a State Railroad Commission, it frequently becomes necessary (for this court) to examine the facts upon which they rest and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the State or its commission with the interstate commerce of the railroad.

Whether there has or has not been such an interference is a question of law arising from the facts" * * * "The order (to stop) cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes." * * * "It is the question whether these (such) trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi (South Carolina). The legislature of a State could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.

"The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a State or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

Mississippi Railroad Commission *vs.* Illinois Central R. R., 203 U. S., 335.

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law or a deprivation of the equal protection of the laws.

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

"In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws."

It is settled—

"that the nature and extent of the existing facilities furnished by a carrier for the public convenience

> are essential to be considered in determining whether an order directing an increase of such facilities is just and reasonable, *and that the deficiency of facilities must clearly appear to justify an order directing the furnishing of new and additional facilities.*"
>
> Atlantic Coast Line R. R. Co. *vs.* North Carolina Corporation Commission, 206 U. S., 1.

There is no conflict in the evidence which is before this court, and which was also before the Supreme Court of South Carolina, but which the latter court refused to consider, as to the character of the facilities furnished by the Atlantic Coast Line Railroad Company to the town of Latta. According to the United States census of 1900, Latta had a population of 453 persons; Clio a population of 508, and Dunbar, on the Latta Branch Railroad, a population of 115. The other intermediate points on said branch line had populations of less than fifty persons, and hence are not enumerated in the census.

Eleven (11) daily passenger trains in all directions afford the inhabitants of Latta and its environs opportunity for steam railroad transportation to nearby and distant points (R., 101).

The possibilities of daily travel both to and from Latta are shown at length and in detail at pages 98 to 101 of the transcript of record. From this testimony it appears that the inhabitants of Latta and of the surrounding country have at least a double daily passenger service in practically all directions; that such inhabitants have a distinct advantage in the way of such facilities over neighboring cities and towns of very much greater population and of greater municipal importance along the line of the Atlantic Coast Line Railroad Company in that, in addition to the purely local service said town is served daily, in each direction, by the through New York and Florida express trains, Nos. 39 and 40, and it further appears that if desired the inhabitants of Latta and the towns along the Latta Branch can make reasonably proper connection with train No. 35, north-

bound, in the afternoon, either by traveling to Peedee Junction or Florence, distant from Latta, respectively, eleven (11) and twenty (20) miles, or by driving from Latta to Dillon, a distance of six (6) miles, making connection with said train No. 35 for New York, if desired, at any one of the places mentioned. The south-bound train, No. 35, is scheduled to reach Dillon at 3.05 in the morning and Florence about 4 o'clock in the morning. It seems hardly probable that many of the residents of Latta and its suburbs are filled with the yearning desire of leaving Latta, bound south, at such hour, and in view of the specific object for which this train was established and is operated, namely, to serve primarily the through traffic between New York and Florida, it is hardly to be presumed that even the Railroad Commission of South Carolina would insist that the train scheduled with respect either to the time of initial departure or arrival at destination should be altered in order that said train may be made to pass Latta at a more convenient and reasonable hour.

With respect to the details of accommodations actually furnished by the defendant Railroad Company to the residents of Latta and its environs, we respectfully refer to pages 101 to 113 of our main brief.

A consideration, on the part of the Supreme Court of the State of South Carolina, of the testimony submitted on behalf of the defendant Railroad Company before the referee at Latta, Clio, and Wilmington would have inevitably forced that court to the conclusion that the facilities and accommodations furnished by this Railroad Company to the people of Latta were not only adequate, but exceedingly generous. The conclusion which that tribunal must inevitably have drawn from the consideration of the testimony in question would have logically compelled the holding by said tribunal that the peremptory order of the State Railroad Commission requiring the stoppage at the hamlet of Latta of these through interstate mail and passenger trains was unreason-

able, invalid and not to be enforced. To avoid this result, the Supreme Court of South Carolina refused to consider the evidence in question, although the same had been taken under its order by its own referee appointed for that purpose. This declination was based upon the proposition that the State Railroad Commission was possessed of judicial powers in the matter of ascertaining and determining the facts concerning the adequacy of facilities and accommodations furnished complaining inhabitants by the Railroad Company in question, and that the findings of fact and conclusions of said Commission in such regard were not subject to review by the State courts.

This is contrary to the view of this court as expressed in the Railroad Commission cases above cited. If adhered to in the case at bar it will result in the imposition of a burden upon the plaintiff in error with respect to the movement of its interstate trains without in fact permitting said company to demonstrate anywhere before any tribunal the fact that it had and did fully otherwise perform its duty to the residents of the complaining hamlet.

A cursory examination of the various letters which passed between the town and railroad authorities and the petitions which were before the Railroad Commission, will show that it was not general inadequacy of accommodation or facilities that the people of Latta and its tributary towns and country were complaining of. What they wanted and what they demanded in unequivocal terms was the stoppage of these specific through interstate commerce trains.

The petition of Bethea, the intendent of Latta and his associates, which was before the Railroad Commission and with other similarly worded documents presumably furnished the basis for the Commission's order, is as follows:

> *"To the Honorable Board of Railroad Commissioners:*
>
> "Having made effort with the railroad authorities to stop trains Nos. 32 and 35, without effect, we the undersigned, town council and business men of Latta,

> S. C., hereby petition your honorable Board to make Latta a flag station *for said trains* for passengers only" (R., 61).

In transmitting this petition to the Board of Railroad Commissioners, Intendant Bethea naively remarks that—

> "We learn that if your Board think it will be of any service, we can get all the stations between Latta and Clio to send them *as they are anxious for this train to stop*" (R., 61).

The Board referred this petition "requesting flag stops for Nos. 32 and 35" at Latta to the railroad company with the "hope that this is a reasonable demand," and that "these stops on flag" would be made "without a formal hearing in this office" (R., 63).

The reply of the railroad company, showing why in its view the request of Latta was not considered to be reasonable and why the desired stops could not be made without destroying the character and usefulness of the trains specified, appears at pages 64, 65, and 68 of the printed transcript.

Under date of July 1, 1904, the Commission informed the company "that the Attorney General has given the citizens of Latta the information that this Board can require the trains referred to to stop at Latta if the local conditions have not been adequately met," and said citizens demand that "we have said trains stopped, as they have not the required accommodations they are entitled to under the law" (R., 69).

Under date of July 18, 1904, the Commission advised the company that it had "decided before taking final action in the matter of the train service rendered the people of Latta to make a personal visit to Latta." * * * "We will be glad to have you meet us" there (R., 70).

On the appointed day, Mr. Willcox, one of the company's attorneys, and Mr. Royall, its general superintendent, met two of the Railroad Commissioners at Latta for the purpose of this personal inspection. No witnesses were summoned or

called by either party to the controversy and no evidence in the way of documents or reports was submitted.

Subsequently the Commission passed its order, which is set forth at large herein *ante*.

This order requiring the company to stop the trains in question at Latta on flag recites that it is based upon the "personal inspection of the situation at Latta and the demand of the citizens for these accommodations," from which it appeared to the Board "that sufficient accommodations were not furnished to these citizens to fulfill the requirements of the statutes of this State" (R., 71).

What these supposed statutory requirements were does not appear, either in this record nor, so far as we have been able to discover, in the statutes themselves.

Except in the testimony submitted to the Supreme Court of the State and by it rejected, the company has never been called upon or permitted to make a showing as to the character of the accommodations actually furnished at Latta.

In view of this, it cannot be said that the alleged deficiency of facilities at Latta has been made so clearly apparent as to justify the order in question. Until such deficiency has been made clearly to appear, it is insisted that the order of the State Railroad Commission about to be enforced by the State Supreme Court constitutes an unconstitutional exercise of power and an illegal interference by the State or its Commission with the interstate commerce of the railroad.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 296.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

J. H. WHARTON, B. L. CAUGHMAN, AND JOHN H. EARLE, AS RAILROAD COMMISSIONERS OF THE STATE OF SOUTH CAROLINA, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

J. FRASER LYON,
Attorney-General.
M. C. WOODS,
Attorneys for Defendants in Error.

STATEMENT OF FACTS.

Latta is a town located on the main line of Atlantic Coast Line Railroad, in the County of Marion, South Carolina. Such main line extends from Richmond, Virginia, to Tampa, Florida. Leading back from Latta as

a junctional point in a westerly direction, Atlantic Coast Line owns and operates a branch railroad, lying wholly within the State of South Carolina, twenty-one miles in length, known as the Latta Branch, to the town of Clio, in Marlboro County. Latta is comparatively a small village of approximately one thousand inhabitants, and Clio is not so large. Both are located in a thickly settled agricultural country. The people of Latta and the territory adjacent thereto, of the stations along the Latta Branch and the territory adjacent thereto, and of Clio and its adjacent territory, a minimum distance of twenty-one miles of thickly settled, prosperous and populous country, are wholly dependent upon the passenger accommodations furnished at Latta for ingress and egress from and to the outside world. Hence it would seem clear that Latta, owing to its situation as indicated, though small of itself, is a passenger point of importance, because of the large number of people that have to use the passenger trains there. (Testimony pp. 21-61; also blue prints appendix.)

In November, 1903, J. J. Bethea, Intendant of Latta, wrote to Mr. Emerson, of the Coast Line, requesting better passenger accommodations.

"Our town is progressing rapidly and people are moving in here to get the benefit of the school and church advantages; and others would come, but say the means of getting out and in town by rail is too bad. We want it so we can go South to Charleston, Columbia, or anywhere in that direction and get home without having to lay over. As it is, we can go to Wilmington, N. C., all O. K., but we can't get home when we get off without laying over in Florence or somewhere.

"Please look into this matter at once, as we and the people on the Latta Branch road are at a disadvantage with the adjoining towns, and please let us hear from you at once in regard to this matter, as I must do something." (pp. 21-22.)

It will be noted that nothing was said about stopping any particular trains. The letter was merely a request for better accommodations. Mr. Royall, of the Coast Line, replied to this letter:

"Referring to your letter of the 19th inst., addressed to Mr. H. M. Emerson, which has been referred to me by Mr. J. R. Kenly, our Fourth Vice-President. We have looked very carefully into this matter, and I regret to say that the schedule of our Train No. 32, which has just been arranged for the winter season, will be so fast that it will be impossible for us to make an additional stop between Florence and South Rocky Mount. The schedule is a very fast one, and the train is quite heavy, and we are unable at present to make up any time, and it is with great difficulty that we can hold to the present schedule figures. It would give us pleasure to comply with your request if it was in our power to do so." (p. 22.)

Mr. Royall, it will be observed, endeavors to switch off the issue of furnishing better accommodations on to the fast mail.

Mr. Bethea's reply will also be found at page 22:

"Yours to hand, and in reply will say that all we ask for is better accommodations so we can get here from the South at night. As it is, we have to lay over at Florence or elsewhere. We have always been a very modest people; never asked for a passenger depot and

freight, too, nor have we ever been before the Railroad Commission, but appeal to you. We want it so fixed that we can get in here from Florence at night. We don't ask for fast trains to stop, but we want better accommodations. Let me hear from you at once, etc."

We beg earnestly to call the attention of the court to the fact that in its inception this contention was an effort to obtain better accommodations only to meet local conditions. We shall endeavor to show that the railroad authorities persistently ignored requests of this character, and have sought to nullify local demands upon the railroad as a public servant by insisting that the fulfilling of its primary duty to local territory, necessarily involved the sacrificing of its secondary duty as an interstate carrier, a high-handed proposition not to be considered, thus attempting to set forth its interstate function as an excuse for ignoring local duties, and to set at naught the needs of the citizens of the State that has endowed it with a measure of sovereign rights in acquiring rights of way for its road bed; taking public benefits and denying its reciprocal obligations to the public.

Having failed to get any relief, better accommodations without interfering with the fast trains, the citizens of Latta and along the Latta Branch Railroad, petitioned the Board of Railroad Commissioners to afford the relief they sought by stopping Trains Nos. 32 and 35. (pp. 61-63.) Pursuant to the prayers of these petitions, after having sought, through correspondence with all parties to effect an adjustment (pp. 63-64), the Chairman of the Railroad Commission notified Mr. Royall, General Superintendent, that the Board of Commissioners would

have a hearing at Latta May 18, 1904 (p. 66). For various reasons, the hearing was deferred from time to time, and was not held until July 25, 1904 (p. 70). At the hearing the railroad company was represented by Mr. Royall, General Superintendent, and its learned Division Counsel, Mr. Willcox, and each side made a showing as to its contention in the premises (p. 73). The finding of the Board will be found at page 71, and is

"On petition of the town authorities of the town of Latta and of Clio, and citizens along the Latta Branch Railroad, for the stopping of Trains Nos. 32 and 35 on flag, for receiving and delivering passengers at said station, after personal inspection of the situation at Latta, and the demand of these citizens for these accommodations, it appears to the Board that sufficient accommodation was not furnished to these citizens to fulfill the requirements of the statutes of this State. The evidence was sufficient to warrant this Board in demanding that better accommodation should be furnished, and that it was not unreasonable to ask the said company to stop Trains Nos. 32 and 35 on flag. Therefore it is hereby ordered that said trains shall stop on flag at said Latta station on and after August 1st."

Under the laws of South Carolina (Code 1902, Section 2119), the railroad company had sixty days in which to comply with this order. The company having failed to grant any relief whatever, or to pay any attention to the order of the Railroad Commission, at the request of the Railroad Commission, the Attorney-General on October 14, 1904, instituted an action within the original jurisdiction of the Supreme Court of South Carolina, praying for a writ of mandamus (p. 10). The

action was commenced by the service of a rule to show cause why the prayer of the petition for mandamus should not be granted, directed to the railroad company, which for return interposed a demurrer to the petition (pp. 9-12). The demurrer was based upon five general propositions, which, briefly stated, are:

1. That the Railroad Commission was without power to make the order in question.

2. That the facts upon which such order was based were not judicially determined, and its enforcement would deprive the railroad company as a citizen of its property without due process of law.

3. That the Supreme Court of South Carolina was without jurisdiction in the premises because

(a) No statutory authority is given to hear and determine the issues of fact involved.

(b) A writ of mandamus cannot be used as an original proceeding to try and determine the question of right.

4. That the complaint states that the Railroad Commission had found as a fact that sufficient accommodations did not exist, but failed to allege as a fact that such accommodations did not exist.

5. That whatever might be the powers of the Railroad Commission to require greater conveniences to be given to a certain locality, such power did not embrace the right to control the operation of specific trains.

The Supreme Court of South Carolina overruled the demurrer in detail upon the following grounds (pp. 13-17).

As to 1. Because the court held that the Railroad Commission had the power to determine and make the order under Section 2069, Code S. C., 1902:

"Whenever in the judgment of the Railroad Commissioners it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling stock or any enlargement of or improvement in the stations or station houses, or any modification in the rates of fare for transporting freight and passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper; and, if the said company shall fail within sixty days to adopt the suggestions of said Commissioners, they shall take such legal proceedings as they may deem expedient, and shall have authority to call upon the Attorney-General to institute and conduct such proceedings."

As to 2. Because the facts were determined after due hearing at which the railroad company appeared and made a contest on the merits before a well recognized and generally adopted tribunal; and quotes the language of this court from Louisville and Nashville Railroad Company vs. Schmidt: "It is no longer open to contention that the due process clause of the fourteenth amendment of the Constitution of the United States does not control mere forms of procedure in State courts,

or regulate the practice therein. All requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity to defend." 177 U. S., 230.

As to 3. (a) Because the Supreme Court was not invoked to hear and determine issues, but to require obedience to an order based on facts already determined by proper authority.

(b) Because mandamus is the usual and proper method specifically provided by statute. Section 2119, Code S. C., 1902, provides:

"If any railroad shall neglect or refuse to comply with the provisions of this chapter, or with the rules and regulations prescribed by said Commissioners within the limit of their authority such company shall be subject to a writ of mandamus, to be issued by any Justice of the Supreme Court, or Circuit Judge, upon application of the Commissioners or a majority of them, to require compliance with said laws or said rules and regulations, and failure to comply with said writ of mandamus shall be punishable as for contempt; and for any wilful violation of any of said laws, or failure to comply with the requirements of said rules and regulations, the court may award such costs and counsel fees on return of said writs and after due deliberations thereon, as may be just."

As to 4. Because the Railroad Commissioners had the power, under Section 2069 above quoted, to determine the facts embraced in their order, and had determined such facts.

As to 5. That under the police power, the Legislature can require all regular trains not engaged in interstate commerce, to stop at certain stations, and that the power to require all, necessarily includes the right to stop a less number or a particular train.

We beg to call the attention of the court to the fact that the Supreme Court of South Carolina, when this decree was filed, had before it the bill of complaint and the demurrer only, and nothing to indicate that Trains Nos. 32 and 35 were possibly interstate trains.

The Railroad Company then made its further return to the rule to show cause by answering generally, and the various defences are so comprehensively embodied in the assignments of error that we deem it unnecessary to set them forth in detail. Upon the filing of the answer and return, the material allegation as to the fact of a hearing having been had at Latta, as set forth in the bill of complaint, having been controverted, his Honor, Mr. Chief Justice Pope of the South Carolina Supreme Court, granted an order of reference directed to F. F. Covington, Esq., to take testimony (p. 20). Various references were held, at which the testimony of a large number of witnesses was taken (pp. 21-118). After hearing full argument upon the facts and the law, the Supreme Court of South Carolina filed its final decree directing that the writ of mandamus issue in the following words:

"This court has reached the conclusion that the writ of mandamus should be issued; but in order that respondent may have the opportunity of discharging its primary duty in the premises without stopping Trains Nos. 32 and 35 on flag, the writ will be so framed as to

confer upon the railroad company the alternative right to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping Trains Nos. 32 and 35 on flag." (p. 125.)

The railroad company filed a petition, which embodied substantially the same questions as are raised by the appeal to this court for a rehearing; and all proceedings were stayed pending consideration of the petition, which was ultimately refused. The mandamus issued precisely as the court had directed, that is, in the alternative, and the railroad company appealed to this court on the assignments of error set forth in the record. Pending this appeal, the writ of mandamus has been stayed and rendered inoperative by order of supersedeas of his Honor, Mr. Justice Brown, of this court.

ARGUMENT.

The first two assignments of error pertain to the demurrer and are:

First. That the said Supreme Court of South Carolina upon its refusal to sustain the defendant's demurrer to the complaint, denominated petition, filed as an interlocutory decree, dated March 15, 1905, erred in holding that the enforcement by mandamus proceedings of the order of the plaintiff Railroad Commission of the State of South Carolina, attempted to be exercised and enforced under and by virtue of Sections 2069 and 2119 of the Code of Laws of the State of South Carolina of 1902, did not deny to defendant its day in court on the merits of said order of the Railroad Commission, and did not thereby abridge the privileges and immunities of the defendant as a citizen of the United States, and

deprive it of its property without due process of law, and deny to it the equal protection of the laws in violation of Article 14 of the amendments, Section 1, of the Constitution of the United States.

Second. That the said Supreme Court of South Carolina, upon its refusal to sustain the defendant's demurrer to the complaint, denominated petition, filed as an interlocutory decree, dated March 15, 1905, erred in holding that by virtue of Section 2069 of the Code of Laws of South Carolina of 1902, the Railroad Commission of the State of South Carolina had the legislative function, and in addition to the legislative function, the judicial function, and that the enforcement of said order of the Railroad Commission by a mandamus proceeding, which did not afford to the defendant a trial on the question of fact, or the right of inquiry as to the merits of the order; did not deny to defendant its day in court, and did not abridge the privileges and immunities of defendant as a citizen of the United States, and did not deprive it of its property without due process of law, and did not deny to it the equal protection of the laws in violation of Section 1, of Article 14 of the amendments to the Constitution of the United States.

The rule to show cause was returnable November 12, 1904, and the first return of the railroad company was by way of demurrer (p. 11). The Supreme Court of South Carolina filed its decree March 15, 1905. Thereafter the railroad company answered generally, which, as we take it, operated as a waiver of the demurrer.

But, for the sake of argument, conceding that plaintiff in error is not out of court on the demurrer, and answering the assignments of error on their merits as

matter of fact, did the enforcement of the order of the Railroad Commission by mandamus proceedings—

(a) Deny plaintiff in error its day in court on the merits of the order of the Railroad Commission?

(b) Abridge its privileges and immunities as a citizen?

(c) Deprive it of its property without due process of law?

(d) Deny it equal protection of the law in violation of the Constitution of the United States?

As we have seen, Section 2069, Code S. C., 1902, confers upon the Railroad Commission the power in its judgment to settle questions with a view to promoting "the security, convenience and accommodations of the public." The question at issue was the passenger accommodations afforded a large number of citizens, and we fail to perceive how it can be seriously questioned that the Board had no jurisdiction of the subject matter.

(a) As a matter of fact, the Railroad Commission did not deny to plaintiff its day in court. It was notified to appear at the hearing, acknowledged receipt of notice, promised to appear, did appear by Mr. Royall, General Superintendent, and Mr. Willcox, Division Counsel, and contested the issue. (pp. 70-73.)

(b & d) And if it had its day in court and was heard fairly (and there is no complaint that it was not), then we venture to think its privileges and immunities as a citizen, and equal protection of the laws, are neither abridged nor denied.

(c) The regulation of the accommodations afforded the traveling public is a police regulation. Gladson vs. Minnesota, 193 U. S., 53; Mississippi vs. R. R. Co., No.

64, October term, 1906. The due process clause of the fourteenth amendment does not control forms or procedure and regulate practice in State courts. In having notice and in appearing and defending, plaintiff in error had all the rights, privileges and immunities guaranteed under the Constitution. R. R. Co. vs. Schmidt, 177 U. S., 239.

And having vested the Railroad Commission with the power in its judgment to decide the subject matter at issue under Section 2069 of the Code, the Legislature, under Section 2119, has specifically provided how the rules and orders may be enforced, by a writ of mandamus, precisely the practice that defendants in error have followed to the letter in this controversy.

The first half of the second assignment of error complains that the Supreme Court of South Carolina erred in holding that the Railroad Commission had

(a) The legislative function.

(b) The judicial function.

The Supreme Court of South Carolina did not hold that the Railroad Commission had general legislative and judicial functions. What it did hold was that the Legislature of South Carolina, under Section 2069 of the Code, had delegated to the Railroad Commission the power to investigate and decide the question of passenger accommodations furnished citizens of the State by railroad corporations, and to make such orders as they might deem proper "in order to promote the security, convenience and accommodation of the public." It is true that the power to investigate, which carries with it the power to adduce evidence and to hear testimony, and the power to reach conclusions and decide and order

are functions usually delegated to courts, and it is further true that the power to make rules and regulations for the control and government of citizens is a function usually delegated to Legislatures. But in the settlement of many questions of detail arising under the police regulations and in making such settlement effective, we venture to say that most, if not all, of the States in the Union have delegated functions, both judicial and legislative in character, to particular bodies. This court has certainly recognized that a State has the right to constitute bodies to legislate and to judge in matters pertaining to its internal affairs. So long as the results of such legislative action and judicial determination do not conflict with national authority, they are not matters of national concern. And in like manner, so long as the State of South Carolina has clothed an arm of the government of its internal affairs with the power to hear and to judge, with the power to order and to legislate, does it necessarily follow that, because it chooses to denominate such arm of its government a Railroad Commission, instead of by some other name, an attempt by such arm of government to legislate and to judge is in contravention of the Federal Constitution? We submit that mere names and mere forms of procedure in State government, so long as they are fair, are not matters of national concern.

The second half of the second assignment avers that the Supreme Court of South Carolina erred in holding "that the enforcement of said order of the Railroad Commission, which did not afford to the defendant a trial on a question of fact, or the right of inquiry as to the merits of the order, did not deny to defendant its day

in court, and did not abridge the privileges and immunities of defendant as a citizen of the United States, and did not deprive it of its property without due process of law, and did not deny to it the equal protection of the laws." This is an utterly distorted, biased and untrue statement. The Supreme Court of South Carolina held nothing of the kind. On the contrary, it held that defendant had a fair hearing by a legally constituted tribunal. It will be further observed that the question raised by the complaint to which plaintiff in error demurred, alleged one actionable fact, that is, that such an order had been made.

And as to the right of plaintiff in error to inquire into the merits of the order, any such right, if it had existed, was forfeited by the negligence of plaintiff in error. In acknowledging the notice of the order, the written notice required by statute, Mr. Royall, General Superintendent, says (p. 72)):

"I beg to acknowledge receipt of your letter of the 24th instant, enclosing copy of letter of July 29th, which came to me by express, in reference to Trains Nos. 32 and 35 stopping on flag at Latta, S. C. I regret that I have heretofore failed to acknowledge receipt of this letter of July 29th. My information is that the company has sixty days in which to decide the matter. Will you kindly advise me if I am properly informed as to this?"

Mr. Duncan, Secretary of the Commission, replied:

"Replying to your favor of the 30th ultimo, I beg to say that your information is correct, and that your company, under the statutes of this State, has sixty days in which to decide whether you will accept the order of the

Board or not. The object that I had in my last favor addressed to you, was simply to know if you had received this communication. This was the only matter I was responsible for."

We submit that the time to inquire into the merits of an adverse order of this character, by injunction or certiorari, as it might deem advisable, was during the sixty days. The record does not show that it did anything, and, as a matter of fact, it did nothing. It acquiesced in the merits of the finding by inaction, and rested on the right of its might to defy the Railroad Commission. Naturally the next step of the Railroad Commission was a mandamus proceeding.

The third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error really go to the pith of this appeal in raising questions in various aspects as to whether the State of South Carolina, through its Railroad Commission and Supreme Court, has interferred in an unwarranted, illegal, and high-handed manner with the rights of plaintiff in error as an interstate carrier of mails and passengers. They are

Third. That the said Supreme Court of South Carolina erred in holding in its final decree of date February 26, 1906, rendered effective April 9, 1906, that the legislative and judicial control by the Railroad Commission and the Supreme Court of the State of South Carolina of defendant's interstate commerce Trains Nos. 32 and 35, by requiring them to stop at the town of Latta, S. C., was not in violation of and in conflict with Section 8, Article 1, of the Constitution of the United States, and the laws of the Congress of the United States enacted thereunder, and was not a direct burden upon interstate

commerce, and was not a direct and unnecessary interference with the right of defendant to perform its obligation as an interstate commerce carrier of passengers, and not a direct and unnecessary interference with the speedy carriage of the mails of the United States.

Fourth. That the said Supreme Court of the State of South Carolina erred in not holding in its said final decree that it was beyond the power of the Railroad Commission and the Supreme Court of the State of South Carolina to subject to local control by their orders defendant's interstate commerce Trains Nos. 32 and 35 in particulars not within the right of mere police regulations, in requiring them to stop at the town of Latta, S. C., and in not holding that such an exercise of power was in violation of Section 8, Article 1, of the Constitution of the United States, and the laws of the Congress of the United States enacted thereunder, and was a direct burden upon interstate commerce, and a direct and unnecessary interference with the right of the defendant to perform its obligations as an interstate commerce carrier of passengers, and was a direct and unnecessary interference with the speedy carriage of the mails of the United States.

Fifth. That the said Supreme Court of the State of South Carolina, erred in holding in its said final decree, inviolation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State

of South Carolina by its order and the Supreme Court of South Carolina by its decree, had the right to require interstate commerce Trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when it appears that the question of providing by the defendant company of adequate local facilities was not the issue in the original petition of the people of Latta to the Railroad Commission, or considered by the Railroad Commission of South Carolina, and could not, therefore, be used as an excuse for the violation of defendant's interstate commerce rights.

Sixth. That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate carrier of passengers, and as a speedy carrier of United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce Trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when it appears that the question of defendant company's providing adequate local facilities was not before the said Supreme Court, except by way of affirmative defense urged by defendant in its answer on the merits, and when it also appears that the Supreme Court of South Carolina, after appointing its

referee to take the testimony, refused, when this report was made to the court and argued, to consider it, whereas a consideration of and an adjudication upon said testimony would have shown that local accommodations were adequately supplied; and, further, in refusing to consider the fact as to adequate local facilities, violated defendant's rights and immunities as a citizen of the United States, deprived it of its property without due process of law, and denied to it the equal protection of the laws in violation of Section 1, Article 14, of the amendments to the Constitution of the United States.

Seventh. That the Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce Trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when, if this question of adequate local facilities had been contained in the petition of the people of Latta to the Railroad Commission, and had been considered by the Railroad Commission, and had been considered by the Supreme Court of South Carolina, and had become a judicially ascertained fact against defendant's contention, it could not be used

as an excuse for the violation of defendant's interstate commerce rights.

Eighth. That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce Trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company when it should have held that if the question of the defendant's providing adequate local facilities had been considered by the Supreme Court of South Carolina and decided adversely to defendant, it could only afford the Railroad Commission and the Supreme Court of the State of South Carolina the right to an inquiry directed to that end to require the Railroad Company, defendant, to furnish additional and adequate local facilities, and could not give the right of the Railroad Commission and the Supreme Court of the State of South Carolina to invade the interstate commerce rights of the defendant as an original or alternative proposition, and said court should have held that these local facilities could only be furnished by requiring more trains, and not require the

service by including within its orders the regulation of interstate commerce trains.

Ninth. That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its right as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce Trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate facilities otherwise were not provided by defendant company, and that the local authorities of the State of South Carolina, including the Railroad Commission of the State of South Carolina, and the Supreme Court of the State of South Carolina have the power to regulate and control interstate commerce trains of the character of Trains Nos. 32 and 35 as they are shown to be in this controversy in regards other than mere police regulations.

Tenth. That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, that it is only after all local conditions have been adequately met that railway companies doing an interstate commerce business

have the legal right to adopt special provisions for through traffic.

In the case of Illinois Central R. R. Co. vs. Illinois, 163 U. S., 142, the Supreme Court of Illinois issued a peremptory mandamus to require the Illinois Central Railroad Company to turn aside from its direct main line its South-bound fast mail and also all other passenger trains, and back them three and one-half miles to its passenger station in the city of Cairo. This was done under authority of a State statute which required all regular passenger trains to stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety. It will be observed that without regard to adequacy of passenger accommodations or number of trains, the writ of mandamus required absolutely every train to stop, whether local or interstate trains, irrespective of hours of arrival and departure; and it was impossible to operate a single train for interstate business which would be free of the burden of backing into the Cairo station. The court had no alternative but to hold this a direct burden on interstate commerce.

In Cleveland, C., C. & St. L. R. R. Co. vs. Illinois, 177 U. S., 514, the same statute was under construction with the difference in the facts: that the attempt by mandamus of the Supreme Court of Illinois was to stop a particular train known as the Knickerbocker Special, at the city of Hillsboro, which already had four trains per day each way. There was no question of adequacy of accommodations already furnished, but it was a question

of merely a whimsical attempt to stop a particular train for no other purpose than to make it stop under authority of the statute in question. His Honor, Mr. Justice Brown, who delivered the opinion of the court, tersely summarizes the situation:

"The question broadly presented in this case is this: Whether a State statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily, and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question.

"The demurrer to the answer admits that the railway company furnished a sufficient number of regular passenger trains (four each way a day) to accommodate all the local and through business along the line of the road, and that all such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker Special still run and still stop at Hillsboro, and that they furnish ample and sufficient accommodation to all persons desiring to travel to and from that place * * * "

The court held that this was a needless and direct interference with interstate commerce.

In the case of Illinois Central R. R. Co. vs. Mississippi, 138, Fed. Rep. 327, affirmed by this court December, 1906, No. 64, the question at issue was not a question of adequate accommodations, because the court predicates its opinion upon the hypothesis that adequate

passenger facilities were afforded. The complaint was as to equipment and inconvenient times of departure. In his summary of the principles controlling questions of this character, his Honor, Mr. Justice Peckham, says:

"Upon the principles decided in these cases, a State Railroad Commission has the right, under a State statute, so far as railroads are concerned, to compel a company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running, and compel it to stop at a locality named. In such cases, in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right; but if the company has furnished all such proper and reasonable accommodations to the locality as fairly may be demanded, taking into consideration the fact, if it be one, that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly by statute or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop at a particular locality in the State, is an improper and illegal interference with the rights of the railroad company and a violation of the commerce clause of the Constitution."

The court further holds in this opinion that the fact of contracts to transport mails is not conclusive, but is a circumstance to be weighed and considered.

In the case at bar, the specific defence of mail contracts is not plead and is not herein involved. The pleading is to the effect that the trains are engaged in the transportation of mails.

In Lake Shore Co. vs. Ohio, 173, U. S., 285, a statute of the State of Ohio, which required railroad companies operating in Ohio to stop at least three passenger trains each way per day, Sundays excepted, at towns of 3,000 or more inhabitants, for the purpose of receiving and discharging passengers was construed. The result was that interstate commerce trains had to stop. The court said:

"The power of the State by appropriate legislation to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, and the public safety."

In C., C., C. & St. L. R. R. Co. vs. Illinois, 177, U. S., 514, the court summarizes the holding of the Lake Shore case in these words:

"While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do more than this, and may then provide special facilities for the accommodation of through traffic."

The Supreme Court of South Carolina in its final decree, which will be found at page 123 of the Record, predicates its opinion on the holding of this court in the Lake Shore case.

Accordingly, we submit the Supreme Court of South Carolina held that the State had jurisdiction through its Railroad Commission, and properly so. We further submit that the Supreme Court of South Carolina was warranted in deducing from the holdings of this court that the primary duty of even an interstate railroad is to its local territory, and the secondary duty is to interstate traffic. To our mind our State has not endowed this corporation with being and with the sovereign right of condemnation of private property to acquire a highway without compensatory obligations to our citizens; endowed it with such being and such right for the pleasure of seeing the citizens of other States and countries ride through our borders with accommodations paramount to those of our own citizens. Our Supreme Court has held in effect: Discharge your primary obligation and you are welcome to your highway for the accommodation of the citizens of our neighbors.

How has plaintiff in error discharged its obligations? What are the facts as applied to the principles of law announced by this court?

In the first place, though the assignments of error proceed on the assumption that the trains in question are interstate commerce trains, we believe this is open to question. It will be seen, testimony p. 102, that these trains are made up in Jersey City and run to Tampa, and vice versa. They are local trains in Florida; stop at a number of local stations in Georgia and at Hardeeville, Ridgeland, Yemassee, Charleston, Lanes, Florence, and Dillon, in South Carolina. Passengers may flag these trains, and are received as passengers within the State, and they are transported to other flag and regular

stops within the State. Which shall we call them, local or interstate in character? Are they not both? And it also appears from the testimony cited, that Trains 39 and 40 run between Jersey City and Jacksonville. If the State of South Carolina cannot require Trains 32 and 35 to stop at Latta, it cannot require Trains 39 and 40 to stop. And then these citizens would have no main line train at all on which to ride to and from the outside world, and the State would be powerless as against its own offspring.

As we understand the holdings of this court, local conditions and facilities have to be provided for, and State authorities, in the absence of Congressional legislation, may require interstate trains to stop to fulfill local requirements of this character. Were local requirements met and adequate facilities furnished?

As we have seen, this entire controversy grew out of a complaint as to adequate passenger accommodations with the express declaration, "We don't ask for fast trains to stop, but we want better accommodations." (p. 22.) The railroad authorities did nothing. The next step was an attack on Trains 32 and 35 in the various petitions to the Railroad Commission to require them to stop. (pp. 62-63.) The Railroad Commission tried, through correspondence, to get the matter peaceably adjusted, and adequate accommodations furnished without success. (pp 64-68.) The next step was the hearing at Latta by the Commission, at which all parties put in a general appearance and contested on the merits. (p. 73.) The Board found three things: *That sufficient accommodations were not furnished; that better accommodations should be furnished, and that it*

was not unreasonable to ask the stopping of Trains 32 *and* 35. (p. 71.) *Upon these findings it ordered the trains to stop. Did the plaintiff in error obey? If it had, we would not have been here today. Did it appeal from these findings to have them reviewed on their merits by injunction or otherwise, as did the Illinois Central in Mississippi? Not at all. What it did was to defy the Railroad Commission? These findings were judicially determined and are fixed, determined and settled. There is no appeal from them before this court, and there is no record produced for this court to declare whether such findings were just or unjust.* Under the allegation of the complaint, this is all we had to prove (p. 10); and it was all the Supreme Court wanted to know in order to make its finding. (p. 35.) The work of taking the testimony, pp. 20-120, was useless, but we were willing to accommodate our friends, and to let them get the situation before the court. And what did the testimony disclose? That Latta has eleven trains arriving and departing per day (p. 101)—a fact from which our learned opponents have derived great comfort. A cursory analysis will show that seven of these are Latta Branch side-line trains leading into the back country and two main line trains each way, 35 and 39 South-bound, and 32 and 40 North-bound. No. 40 arrived at 10:30 a. m., going North, and No. 39 at 7 p. m., going South. The other main line trains, 32 and 35, are the trains involved in this appeal. They do not stop. So of main line service and main line trains, Latta and the twenty-one miles of thickly settled back country are dependent on single once-a-day main line service, which these people in their testimony, pp. 20-94, say they find

intolerable. Indeed, we produced a large number of witnesses who testified that the accommodations were utterly inadequate. Whether a citizen should be allowed to arrive at and depart from his home more than once a day is a matter of opinion. But we do say it is a matter of large significance when the people of a large territory rise to demand their rights as they see them, and with unfaltering tenacity and fortitude cling to their cause through four long years of bitter contest, threading their way over every obstacle that a wealthy and well organized corporation can interpose to this highest and mightiest tribunal of our land, seeking justice.

In opposition to this mass of evidence, with any number of trainmen on the ground familiar with the situation, with accurate data as to sale of tickets and number of passengers, plaintiff in error did not produce a single man from the scene of turmoil or introduce a scintilla of testimony, going to show there were but few passengers, to disprove the demand for more trains. Had their local trainmen been able to testify that local conditions did not demand better service, and had ticket sales been small from the territory in question, we venture the assertion that our opponents would have eagerly produced the evidence. We venture the further assertion that, if they had produced such testimony, they would have proven themselves out of court; and, accordingly, they did not dare.

Instead, they put up, pp. 94-120, the General Passenger Agent, the Traffic Manager, the Superintendent of Transportation, and the Superintendent of the First Division from the general offices in Wilmington—all experts. They did not pretend to know anything about

the local conditions; but, as experts from a theoretical standpoint, expressed the opinions that adequate accommodations were furnished. It is sufficient to say that expert opinion and theory are poor consolation for a citizen when he wants a train.

We do not deem it proper to burden the court with an analysis of the testimony, especially in view of the fact that the facts at issue were determined by a tribunal of competent jurisdiction from which no appeal was taken. These facts, we earnestly believe, would have warranted the Supreme Court of South Carolina in granting a peremptory writ of mandamus as prayed for in the complaint, this being one of the instances in which this court has held that State authority may stop interstate trains.

But the question presented is whether, as a fact, the Supreme Court of South Carolina has unwarrantedly and illegally placed a burden on interstate commerce in contravention of the Constitution. If it had peremptorily required particular trains to stop, the loophole mentioned by this court would have still been open to run additional trains without interference for the accommodation of interstate traffic—just as many as it pleased; and in this way there would have been no direct burden on interstate commerce. But the mandamus reads:

"Now, therefore, that due and speedy justice may be done, you, the defendant, the Atlantic Coast Line Railroad Company, are hereby commanded that you, the said Atlantic Coast Line Railroad Company, do immediately after the receipt of this writ, stop your passenger Trains Nos. 32 and 35 at your station in the town

of Latta, when flagged, for the purpose of receiving and delivering passengers at said station, with the alternative right on your part to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping Trains Nos. 32 and 35 on flag, and that you do pay the costs, etc."

Hence, if these trains have to stop, it is the fault of the plaintiff in error. The mandamus places no burden as a matter of necessity upon them. There is no burden on interstate commerce direct or implied. The plain reading of the mandamus is that plaintiff in error may discharge its duties by affording accommodations to these citizens and running these particular trains as it pleases. Only after failure to exercise its alternative right does it become necessary to stop the alleged interstate commerce trains.

And yet the alternative provision is the complaint of the eleventh and last assignment of error; because, as is claimed, it is undefined; is without warrant of law; is based upon a question not decided by the court, and is without legal quality of being used as a coercive alternative to control interstate commerce rights of the defendant. We submit that it has been judicially determined that inadequate local accommodations were furnished. If we understand the Lake Shore case and the recent Mississippi case, the alternative of not furnishing sufficient accommodations is to stop, as a matter of right, interstate trains. This is precisely the doctrine announced by the Supreme Court of South Carolina; and plaintiff in error may discharge its duties in the premises simply by running more and additional

trains to fulfill local conditions, which would give substantially the same accommodations as Trains 32 and 35. It is true the complaint demands the stopping of specific trains, and the decree of the Supreme Court of South Carolina grants less; but that is no reversible error if the conclusion reached is otherwise sound.

We, therefore, submit that the order of supersedeas heretofore granted by his Honor, Mr. Justice Brown, should be dissolved, and that the decree of the Supreme Court of the State of South Carolina should be affirmed by this honorable court.

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No. 250.

Supreme Court of the United States

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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 296.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. H. WHARTON, B. L. CAUGHMAN, AND JOHN H. EARLE, AS RAILROAD COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF ATLANTIC COAST LINE RAILROAD COMPANY.

ALEXANDER HAMILTON,
GEO. B. ELLIOTT,
F. D. McKENNEY,
Of Counsel.

P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Atlantic Coast Line Railroad Company.

STATEMENT OF CASE.

I.

The Atlantic Coast Line Railroad Company, a corporation created and existing under the laws of the State of Virginia (Answer, printed Transcript of Record, p. 18), operates a through line of railroad from the City of Richmond, Va., to the City of Port Tampa, Fla., making connection at the latter place with the Peninsula and Occidental Steamship Company for Havana, Cuba. From Richmond the line extends on North by

way of the Richmond, Fredericksburg and Potomac, Washington Southern and Pennsylvania Railroads to Jersey City, N. J., to the terminals immediately opposite New York City, thus forming one continuous line of railroad, over twelve hundred miles in length, from New York City *via* Washington to Port Tampa, Fla.

Printed Transcript of Record, pp. 94, 95, 104, 106, 107, 108, 110, 111, 114, 119.

II.

Prior to 1892, the main line ran *via* the Wilmington, Columbia and Augusta Railroad to Wilmington, N. C., thence *via* the Wilmington and Weldon Railroad to Weldon, N. C., and thence on to Richmond, Va. About 1886 it was decided to shorten the distance from New York to Florida, and a charter was accordingly procured to build a line for this purpose. This line began at Contentnea, a station on the Wilmington and Weldon Railroad in North Carolina, and extended to a junction on the Wilmington, Columbia and Augusta Railroad at the Great Pee Dee River in South Carolina. The cut-off thus constructed, known as the Florence Railroad, or "Wilson Short Cut," was one hundred and forty and seven-tenths miles in length, and shortened the distance from New York to Florida by sixty-one and two-tenths miles. In building this short cut the promoters were not endeavoring to construct a line to serve local conditions between Contentnea and Pee Dee Junction, but their sole purpose was to construct a cut-off in order to have a nearer and more direct route from the North and East to Florida and the West Indies. The "Wilson Short Cut" was completed in 1892, and in the winter of 1893 through traffic between the North and East and the South was diverted over it.

Printed Transcript of Record, pp. 107, 108, 119.

III.

Although not constructed to serve local conditions, as was to be expected a number of small towns sprang up on the "Wilson Short Cut," among them Dillon and Latta, situated some six or seven miles apart in the upper part of Marion County, South Carolina.

Printed Transcript of Record, pp. 25, 26, 27, 28, 35, 54, 57, 64, 65, 76, 77, 79.

IV.

Some time after building the "Wilson Short Cut" the Atlantic Coast Line constructed a small, unimportant line, twenty

miles in length from Latta to Clio, a hamlet in Marlboro County, South Carolina. This line, known as the Latta Branch Railroad, serves a purely agricultural community, and has only a few very small stations along its entire length. Short and unimportant as this Latta Branch is, however, a double daily passenger service is maintained over it, affording connection at Latta at least once each day with through trains going to all points North, East, South, and West.

Printed Transcript of Record, pp. 24, 28, 29, 30, 76, 77, 82, 83, 84, 91, 92, and especially 98, 99, 100, 101, 117.

V.

In 1885 or 1886 the Atlantic Coast Line Railroad Company began the operation of a through line of fast mail and passenger trains from Florida points to New York City and the East. At first these trains ran *via* Wilmington, N. C., but in the winter of 1893 they were diverted over the short cut mentioned above, which materially shortened both the distance and time of the run. Owing to the fine winter climate of Florida and the West Indies, and the easy access to these resorts afforded by a direct line of railroad operating luxurious trains running very fast schedules and making close steamship connections at Florida points, an immense tourist travel sprang up from the North and East. So enormous has this business become that whereas in 1886 the Atlantic Coast Line occupied the entire field, now there are two other trunk lines—the Southern and Seaboard—in active competition, each handling its full quota of the traffic. (Printed Transcript of Record, pp. 95, 96.) This high-class tourist travel demands the very best service in every respect, and any road failing to maintain such service promptly declines in patronage. To meet the demands of such travel, and in order to carry the mails for the United States Government from the North and East to Cuba and the West Indies, the Atlantic Coast Line Railroad Company inaugurated two very fast mail and passenger trains running from Port Tampa, Fla., to New York City, known as the Florida and West Indian Limited trains, Nos. 32 (northbound) and 35 (southbound).

Answer, printed Transcript of Record, pp. 18, 19.

Printed Transcript of Record, pp. 94, 95, 105, 106, 107, 108, 109, 110, 115, 116.

VI.

At Port Tampa No. 32 takes a portion of the Cuban mail from the Peninsula and Occidental Steamship Company, and at Jacksonville it takes the other portion of the same mail, which comes through the same steamship company *via* Key West and Miami over the Florida East Coast Railroad. At Washington No. 32 is taken in charge by the Pennsylvania Railroad Company, and is required to leave there at a certain time by that line. Thus its schedule is arbitrarily fixed by conditions beyond the control of the Atlantic Coast Line Railroad Company. (Printed Transcript of Record, pp. 103, 108, 109, 115.) Likewise train No. 35 is controlled by the same factors. (Printed Transcript of Record, pp. 108, 115.)

VII.

In the matter of speed and equipment, the Florida and West Indian Limited trains, Nos. 32 and 35, are among the best in the country, being designed especially for high-class interstate travel. They consist of nine to ten cars, of which six or seven are Pullman, including a dining car, one a mail car, one a baggage and second-class car combined, and one a first-class car. (Printed Transcript of Record, pp. 65, 97). The length of the entire run is twelve hundred miles, and over this they are required to maintain a speed of forty miles per hour. In order to keep up such a high rate of speed, as few stops as possible are made. In southern Georgia and Florida stops are more frequent, caused by the fact that it is in this section that these trains receive or distribute the passengers they carry. In the Carolinas, however, only absolutely essential stops, such as water stops, stops for changing engines, stops for dropping sleepers for connecting lines, etc., are made.

Printed Transcript of Record, pp. 102, 103, 113, 114, 115, 116, 118, 119.

VIII.

Not only does the tourist travel demand fast, high-class trains, but high speed must be maintained in order to comply with the contract with the United States Government to carry the mails from the North and East to Florida and the West Indies. Under the most favorable conditions it is a most difficult matter to make the schedule, but so rigid is the Government with its mail contract, that it requires monthly reports to be made as to any failures to run the trains on time.

Answer, printed Transcript of Record, pp. 18 and 19. Printed Transcript of Record, pp. 65, 68, 95, 96, 106, 116.

IX.

As these two Florida and West Indian Limited trains, Nos. 32 and 35, are designed exclusively for fast mail and interstate tourist travel, they are not adapted for local travel, in view of the fact that they are composed almost entirely of Pullman sleepers with the most limited accommodations for exclusively day passengers. (Printed Transcript of Record, pp. 110, 111, 118, 119.) Not only are they wholly unfit for local travel, but to convert them into local trains would destroy their usefulness and entail great loss on the railroad company, as neither through tourists nor local passengers would patronize them—the first, on account of the low speed, and the second, on account of the extra expense required by the superior class of accommodations furnished by a solid Pullman train.

Printed Transcript of Record, pp. 109, 110, 118.

X.

When the Atlantic Coast Line Railroad Company inaugurated the two fast Florida and West Indian Limited trains, Nos, 32 and 35 mentioned above, it did not thereby annul any of its local trains. (Printed Transcript of Record, p. 111.) On the contrary, about the same time it inaugurated two other heavy through trains operating daily each way from Port Tampa, Fla., to New York City, known as the Atlantic Coast Line Express trains, Nos. 39 and 40. These two trains, Nos. 39 and 40, designed primarily to accommodate both local and interstate travel, make all stops and furnish excellent conveniences for all through travel from any point either to the North or the South. Being designed to accommodate any local travel from State to State, they are amply equipped with a full complement of day coaches, both first and second-class, and Pullman sleepers. In addition, they also carry the mails. In the matter of speed, these two trains run just as fast as Nos. 32 and 35 between stations, but, owing to stops, the time of their run is several hours longer.

Printed Transcript of Record, pp. 30, 76, 77, 81, 84, 87, 90, 92, 97, 111, 116, 118.

XI.

In their passage through South Carolina, trains Nos. 32 and 35 make very few stops, as has been said, and one of the towns they pass without stopping is the little hamlet of Latta, though

they do stop on flag at Dillon, a large town a few miles farther North, and about thirty miles distant from Florence, the last previous stop. (Printed Transcript of Record, pp. 25, 61, 64, 65, 102.) In their movement North and South, *these two trains do not stop at twenty-four towns north of Charleston, S. C., larger than Latta, and over their run south of Richmond, Va., pass eleven junctions beside Latta without stopping.*

Printed Transcript of Record, pp. 101-102.

XII.

On the other hand, the two through express trains, Nos. 39 and 40, operated for the express purpose of accommodating local interstate travel as well as local intrastate travel, make all stops in South Carolina if desired. The northbound train, No. 40, reaches Latta at 10:30 a. m., where connection is made with the train from Clio, thus affording a passenger boarding it at that time a train that takes him, without change, to New York early the next morning. (Printed Transcript of Record, pp. 98 and 111.) Returning, he can leave New York at 9:25 p. m. and reach home the following afternoon on southbound train No. 39, having both going and coming the advantages afforded by Pullman sleepers. (Printed Transcript of Record, pp. 97, 100, 111.) Like facilities are furnished by these trains south of Latta. All parties agree that the accommodations are excellent, the only complaint being that the trains are too slow by reason of having to make the stops.

Printed Transcript of Record, pp. 30, 46, 47, 54, 76, 77, 82, 84, 87, 88, 97, 111, 116, 118.

XIII.

In this condition of affairs, Mr. J. J. Bethea, Intendant of Latta, a mere hamlet containing, according to the last United States Census, only four hundred and fifty-three inhabitants (printed Transcript of Record, p. 101), on November 19, 1903, wrote a letter to Mr. H. M. Emerson, Traffic Manager of the Atlantic Coast Line Railroad Company (printed Transcript of Record, p. 106), of which the following is a copy:

"Latta, S. C., November 19, 1903.

"Mr. H. M. Emerson, Wilmington, N. C.

"Dear Sir: Our town is progressing very rapidly and people are moving in here to get the benefit of the school and church advantages; and others would come, but say the means of get-

ting out and in town by rail is too bad. We want it so we can *go South to Charleston, Columbia, or anywhere in that direction without having to lay over.* As it is, we can go to Wilmington, N. C., all O. K., *but we can't get home when we get off without laying over in Florence, or somewhere.*

"Please look into this matter at once, as we and the people on the Latta Branch road are at a disadvantage with the adjoining towns, and please let me hear from you at once in regard to this matter, as I must do something, etc.

"(Signed) J. J. BETHEA,
"Intendant Town of Latta, S. C.
"[SEAL.]"

(Italics added.) (Printed Transcript of Record, pp. 21, 22.)

To this Mr. W. N. Royall, General Superintendent of the road, replied on the 28th of the same month, informing the people of Latta that after looking into the matter it was found impossible to relieve the situation by stopping train No. 32. (Printed Transcript of Record, p. 22.) On December 10, 1903, Mr. Bethea wrote to Mr. J. R. Kenly, Vice-President and General Manager of the road (printed Transcript of Record, p. 64), saying that all they asked was better accommodations *so that they could get into Latta "at night from the South,"* and denied any desire to have fast trains stop. (See letter at bottom page 22, printed Transcript of Record.) In compliance with these requests of the Intendant of Latta, on January 10, 1904, *the schedule of the Latta Branch train was changed so as to leave Pee Dee Junction after the arrival of trains Nos. 32 and 50*—No. 50 being the local passenger train from Charleston *via* Florence to Wilmington—*which change afforded the people of Latta abundant opportunity to get back home at night from the South, as they had requested.* This ended the first phase of the controversy.

Letter of W. N. Royall, printed Transcript of Record, p. 64.

XIV.

Not satisfied with being furnished an opportunity to get back home at night from the South, as they had requested, and deeming their town of as much importance as its neighbor, Dillon, the people of Latta next began an organized crusade to have the fast mail trains, Nos. 32 and 35, stop at their station, although they had theretofore repudiated such a desire. (Printed Transcript of Record, p. 22.) This opened the second and real

controversy. Accordingly, on February 23, 1904, they forwarded a petition to the Railroad Commission of South Carolina, of which the following is a copy:

"To the Honorable Board of Railroad Commissioners:

"Having made effort with the railroad authorities to stop trains Nos. 32 and 35 without effect, we, the undersigned Town Council and business men of Latta, S. C., hereby petition your honorable Board to make Latta a flag station for said trains for passengers only.

"We will take pleasure in setting forth our reasons for this action at any time that you may suggest, etc."

(Duly signed.)

(Printed Transcript of Record, pp. 61 and 62.)

On March 3, 1904, the Railroad Commission forwarded this petition to Mr. W. N. Royall, General Superintendent, at the same time expressing a hope that the demand was reasonable, and that compliance would be made without any further action. On March 7, 1904, Mr. Royall returned the petition to the Commission with the information that it was impossible to comply with the request, stating the reasons. In this communication it was shown that these two trains, though very heavy, were running a very fast and arbitrary schedule, which it was very difficult to make, and which further stops would render more difficult; that if this request was complied with, other towns like Latta would ask for the same thing, which in the end would practically destroy the trains; that the trains already stopped at Dillon, a few miles away, and that the schedule of the Latta Branch trains had been changed expressly to accommodate these very people. (Printed Transcript of Record, pp. 64-65.) This still did not satisfy Latta, however, so again on May 30, 1904, Mr. Royall wrote Mr. Bethea, giving as an additional reason why trains Nos. 32 and 35 could not be stopped, the fact that the Postoffice Department required the schedule to be made, which would be out of the question with additional stops, but offered to make any change in the schedule of the Latta Branch trains that might be desired to accommodate Latta.

Printed Transcript of Record, p. 68.

XV.

This proposition on the part of the railroad company to arrange a suitable schedule by means of the Latta Branch trains received no notice from the people of Latta, and the next thing they did was to seek legal advice from the Attorney-General of South Carolina. (Printed Transcript of Record, p. 69.) After obtaining the opinion of the Attorney-General, which was

forwarded by the Intendant of Latta to them, the Railroad Commission wrote a letter to Mr. Royall, of which the following is a copy:

"July 18, 1904.

"Mr. W. N. Royall, General Superintendent A. C. L. Railroad, Wilmington, N. C.

"Dear Sir: After receiving your last favor referring to the opinion of the Attorney-General, and also after personal conference with him, we have decided, before taking final action in the matter of the train service rendered the people of Latta, *to make a personal visit to Latta.* Commissioners Wharton and Caughman will leave here on Sunday afternoon, the 24th instant, and go through to Dillon and drive back to Latta by private conveyance so as to be there early Monday morning. We will be glad to have you meet us on that date.

"_____,

"Chairman.

"By order of the Board:

"_____,

"Secretary." (Italics added.)

Mr. Royall replied informing the Commission that he would be present on the day named.

Printed Transcript of Record, pp. 70-71.

XVI.

Accordingly, on July 25, 1906, Messrs. P. A. Willcox, Division Counsel, and W. N. Royall, General Superintendent of the Atlantic Coast Line Railroad Company, met two of the Railroad Commissioners in conference at Latta. (Printed Transcript of Record, p. 73.) Not even the semblance of a trial was held, the conference scarcely having the dignity of an experience meeting. Not only was there no trial held at Latta, *but, as the record shows, the railroad company had only been summoned to meet the Commission in a personal inspection* on the petition of the Latta people; yet the decision of the Commission is based on other petitions, as will appear. (Letter W. N. Royall, printed Transcript Record, p. 69; letter Railroad Commission, printed Transcript of Record, p. 63; testimony Commissioner Wharton, printed Transcript of Record, p. 75.) The result of this conference between a railroad attorney and superintendent on the one side, and two Railroad Commissioners on the other, was an order of which the following is a copy:

"July 29, 1904.

"BOARD OF RAILROAD COMMISSIONERS OF SOUTH CAROLINA,

"*vs.*

"ATLANTIC COAST LINE RAILROAD COMPANY.

"Mr. W. N. Royall, General Superintendent Atlantic Coast Line Railroad, Wilmington, N. C.

"Dear Sir: We beg to hand you herewith the finding and order of this Board in the matter as set forth as follows:

"On petition of the town authorities of the Town of Latta and of Clio, and citizens along the Latta Branch Railroad, for the stopping of trains Nos. 32 and 35 on flag for receiving and delivering passengers at said station. *After personal inspection of the situation at Latta,* and the demand of said citizens for these accommodations, it appears to this Board that sufficient accommodation was not furnished to these citizens to fulfill the requirements of the statutes of this State. The evidence was sufficient to warrant this Board in demanding that better accommodations should be furnished, and that it was not unreasonable to ask the said company to stop trains Nos. 32 and 35 on flag.

"Therefore, it is hereby ordered that said trains shall stop on flag at said Latta Station on and after August 1st.

"_____,

"Chairman.

"_____,

"Secretary."

The decision so rendered was transmitted to the railroad company in the form of a letter, and after giving the matter full consideration the railroad company declined to comply with the *fiat* of the Commission.

Printed Transcript of Record, pp. 71-73.

XVII.

Thereupon the Railroad Commission, through the Attorney-General, brought a suit in the original jurisdiction of the State Supreme Court, to compel the Railroad Company, by means of a writ of mandamus, to stop trains Nos. 32 and 35 at Latta in compliance with the order of the Commission. (Printed Transcript of Record, p. 9.) The complaint erroneously set out that the order of the Commission was passed on the hearing of a petition filed by citizens residing in Latta and along the Latta Branch Railroad, alleging that insufficient accommodations for passengers were furnished at Latta; whereas, the facts were that the only petition before the Railroad Commission—that of

the people of Latta—merely demanded the stopping of trains Nos. 32 and 35 without giving any reason therefor. (Printed Transcript of Record, p. 61.) To this complaint the defendant interposed a demurrer on the ground that it failed to state a cause of action for the reasons, *inter alia,* that the order of the Commission was not the result of a judicially determined fact, and the defendant not having had its day in court on the merits thereof, would be deprived of its property without due process of law should it be enforced, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and that the Railroad Commission, even if it had authority to require accommodations, could not control the operation of specific trains.

Demurrer, printed Transcript of Record, pp. 12-13.

XVIII.

The case was heard before the full court at the October, 1904, term, and on March 15, 1905, a decision was rendered overruling the demurrer, but giving defendant leave to answer.

First opinion of court, printed Transcript of Record, pp. 13 to 17 inclusive; 71 S. C. Reports, p. 130.

XIX.

Taking the view that under the ruling of the court it would have a right to a trial on the merits of the order, the defendant then answered the complaint repeating the legal grounds taken by demurrer, and setting up, *inter alia,* that it had never had a legal hearing on the reasonableness of the order; that sufficient accommodations of all kinds were already furnished at Latta; that trains Nos. 32 and 35 were engaged exclusively in carrying interstate commerce and United States mails from the North and East to Florida and Cuba; that they could not be stopped without impairing their usefulness and cutting off a source of defendant's revenue, and that to compel them to stop at Latta would be not only unreasonable and unnecessary, but a direct burden on interstate commerce in violation of Section 8, of Article 1, of the Constitution of the United States.

Answer, printed Transcript of Record, pp. 17-18-19.

XX.

Taking the opinion of the court to mean that the finding and order of the Railroad Commission was not final and conclusive,

and that it could not be enforced until its reasonableness had been determined by a trial in a regularly constituted court, the Attorney-General of the State appeared before the Supreme Court at its April, 1905, term and moved to have a referee appointed to take the testimony on all the issues involved, and report it to the court. (Order, printed Transcript of Record, p. 20.) F. F. Covington, Esq., the referee appointed under this order, held references at Latta and Clio, S. C., and Wilmington, N. C., and duly reported the testimony taken to the court.

Printed Transcript of Record, pp. 20-75, 75-93, 94-119.

XXI.

The testimony having been reported at the October, 1905, term of the Supreme Court, the matter came on for a second hearing, and after argument the court, April 9, 1906, rendered a final decision to the following effect:

"This Court has reached the conclusion that the writ of mandamus should be issued; but in order that the respondent may have the opportunity of discharging its primary duty in the premises without stopping trains Nos. 32 and 35 on flag, the writ will be so framed as to confer upon the railroad company the alternative right to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag."

(Second opinion, printed Transcript of Record, p. 125.)

Although the testimony was before them, the court refused to consider it, holding that the Railroad Commission was a court empowered by statute to adjudicate the reasonableness of the order, and that its decision was final and conclusive, despite defendant's contention that it would thereby be deprived of its property without due process of law.

Second opinion of court, printed Transcript of Record, p. 123.

XXII.

In this second opinion the court further held that, although trains Nos. 32 and 35 were engaged in interstate commerce, they could be controlled by the State Railroad Commission, and that a writ of mandamus should issue to compel them to stop, whether the reasonableness of the order of the commission had been determined or not.

Second opinion of court, printed Transcript of Record, pp. 123-125.

XXIII.

As has already been stated, the question of sufficient accommodations at Latta was never before the Railroad Commission, but, even if it had been, the court would have found, upon consideration of the testimony, that Latta, with eleven passenger trains a day, had better railroad facilities, both for through and local travel, than towns of much greater importance. (Printed Transcript of Record, pp. 96-100, 101-105, 113.) In addition it would have found, as we have seen, that trains Nos. 32 and 35 were exclusively for interstate passengers and mail; were not suited for local needs; could not be stopped without destroying their value, and could not maintain the schedules required by the Postoffice Department with additional stops.

XXIV.

Both demurrer and answer raised the question that to enforce the order of the Commission without a trial before a court would deprive defendant of its property without due process of law, in violation of Section 1, of Article 14 of the Amendments to the Constitution of the United States, and the answer showed the two trains in question were engaged exclusively in interstate commerce, and claimed exemption from State interference under Section 8, of Article 1, of the Constitution of the United States. As both the decisions of the Supreme Court of South Carolina were against the rights, privileges, and exemptions so claimed, two Federal questions are presented.

XXV.

From the judgments rendered by the Supreme Court of South Carolina in the cause, the case now comes to this court upon writ of error.

ASSIGNMENTS OF ERROR.

FIRST.

That the said Supreme Court of South Carolina, upon its refusal to sustain the defendant's demurrer to the complaint, denominated petition, filed as an interlocutory decree, dated March 15, 1905, erred in holding that the enforcement by mandamus proceedings of the order of the plaintiff, Railroad Commission of the State of South Carolina, attempted to be exercised and enforced under and by virtue of Sections 2069

and 2119 of the Code of Laws of the State of South Carolina of 1902, did not deny to defendant its day in court on the merits of said order of the Railroad Commission, and did not thereby abridge the privileges and immunities of the defendant as a citizen of the United States, and deprive it of its property without due process of law, and deny to it the equal protection of the laws in violation of Article 14 of the Amendments, Section 1, of the Constitution of the United States.

SECOND.

That the said Supreme Court of South Carolina, upon its refusal to sustain the defendant's demurrer to the complaint, denominated petition, filed as an interlocutory decree, dated March 15, 1905, erred in holding that by virtue of Section 2069 of the Code of Laws of South Carolina of 1902, the Railroad Commission of the State of South Carolina had the legislative function, and, in addition to the legislative function, the judicial function, and that the enforcement of said order of the Railroad Commission by a mandamus proceeding, which did not afford to the defendant a trial on the question of fact, or the right of inquiry as to the merits of the order, did not deny to defendant its day in court, and did not abridge the privileges and immunities of defendant as a citizen of the United States, and did not deprive it of its property without due process of law, and did not deny to it the equal protection of the laws in violation of Section 1, of Article 14, of the Amendments to the Constitution of the United States.

THIRD.

That the said Supreme Court of South Carolina erred in holding in its final decree of date, February 26, 1906, rendered effective April 9, 1906, that the legislative and judicial control by the Railroad Commission and the Supreme Court of the State of South Carolina of defendant's interstate commerce trains, Nos. 32 and 35, by requiring them to stop at the Town of Latta, S. C., was not in violation of and in conflict with Section 8, Article 1, of the Constitution of the United States, and the laws of the Congress of the United States enacted thereunder, and was not a direct burden upon interstate commerce, and was not a direct and unnecessary interference with the right of defendant to perform its obligation as an interstate commerce carrier of passengers, and was not a direct and

unnecessary interference with the speedy carriage of the mails of the United States.

FOURTH.

That the said Supreme Court of the State of South Carolina erred in not holding in said final decree that it was beyond the power of the Railroad Commission and the Supreme Court of the State of South Carolina to subject to local control, by their orders, defendant's interstate commerce trains, Nos. 32 and 35, in particulars not within the right of mere police regulations, in requiring them to stop at the Town of Latta, S. C., and in not holding that such an exercise of power was in violation of Section 8, Article 1, of the Constitution of the United States, and the laws of the Congress of the United States enacted thereunder, and was a direct burden upon interstate commerce, and a direct and unnecessary interference with the right of the defendant to perform its obligations as an interstate commerce carrier of passengers, and was a direct and unnecessary interference with the speedy carriage of the mails of the United States.

FIFTH.

That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when it appears that the question of providing by defendant company of adequate local facilities was not an issue in the original petition of the people of Latta to the Railroad Commission, or considered by the Railroad Commission of South Carolina, and could not, therefore, be used as an excuse for the violation of defendant's interstate commerce rights.

SIXTH.

That the said Supreme Court of the State of South Carolina erred in holding in its final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its right as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when it appears that the question of defendant company's providing adequate local facilities was not before the said Supreme Court, except by way of affirmative defense urged by defendant in its answer on the merits, and when it also appears that the Supreme Court of South Carolina, after appointing its referee to take the testimony, refused, when this report was made to the court and argued, to consider it, whereas a consideration of and an adjudication upon said testimony would have shown that local accommodations were adequately supplied, and, further, in refusing to consider the fact as to adequate local facilities, violated defendant's rights and immunities as a citizen of the United States, deprived it of its property without due process of law, and denied to it the equal protection of the laws in violation of Section 1, Article 14, of the Amendments to the Constitution of the United States.

SEVENTH.

That the Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate

local facilities otherwise were not provided by defendant company, when, if this question of adequate local facilities had been contained in the petition of the people of Latta to the Railroad Commission, and had been considered by the Railroad Commission, and had been considered by the Supreme Court of South Carolina, and had become a judicially ascertained fact against defendant's contention, it could not be used as an excuse for the violation of defendant's interstate commerce rights.

EIGHTH.

That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company, to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by defendant company, when it should have held that if the question of the defendant's providing adequate local facilities had been considered by the Supreme Court of South Carolina and decided adversely to defendant, it could only afford the Railroad Commission and the Supreme Court of the State of South Carolina the right in an inquiry directed to that end to require the railroad company, defendant, to furnish additional and adequate local facilities, and could not give the right of the Railroad Commission and Supreme Court of the State of South Carolina to invade the interstate commerce rights of the defendant as an original or alternative proposition, and said court should have held that these local facilities could only be furnished by requiring other trains and more trains, and not require the service by including within its orders the regulation of interstate commerce trains.

NINTH.

That the said Supreme Court of the State of South Carolina erred in holding in its final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws

of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its right as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate facilities otherwise were not provided by defendant company, and that the local authorities of the State of South Carolina, including the Railroad Commission of the State of South Carolina, and the Supreme Court of the State of South Carolina, have the power to regulate and control interstate commerce trains of the character of trains Nos. 32 and 35, as they are shown to be in this controversy in regards other than mere police regulations.

TENTH.

That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, that it is only after all local conditions have been adequately met that railway companies doing an interstate commerce business have the legal right to adopt special provisions for through traffic.

ELEVENTH.

That the said Supreme Court of the State of South Carolina erred in holding in its said final decree, in violation of Section 8, Article 1, of the Constitution of the United States and the laws of the Congress of the United States enacted thereunder, thereby imposing a burden upon interstate commerce and thereby denying to defendant its rights as an interstate commerce carrier of passengers, and as a speedy carrier of the United States mails, that the Railroad Commission of the State of South Carolina by its order, and the Supreme Court of the State of South Carolina by its decree, had the right to require interstate commerce trains Nos. 32 and 35 of the defendant company to stop at Latta, S. C., on the ground that adequate local facilities otherwise were not provided by the defendant company, and that the writ of mandamus should be issued, and issuing same so as to require the defendant to stop its interstate commerce trains Nos. 32 and 35 at Latta, S. C., with the alter-

native provision to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping interstate commerce trains Nos. 32 and 35, said alternative requirement being undefined, and being without warrant of law, is based upon a question not decided by the court, and is without the legal quality of being used as a coercive alternative proposition to control interstate commerce rights of the defendant.

INTRODUCTION TO ARGUMENT.

For the sake of clearness and brevity, we have grouped these assignments of error, and stated in as succinct form as possible the errors they raise, to-wit:

I. Assignments 1, 2, and 6 Relate to Due Process of Law and the Equal Protection of the Laws.

(a) Is the Railroad Commission of South Carolina a court? (Assignment 2.)

(b) Was the hearing before the Railroad Commission due process of law? (Assignments 1 and 2.)

(c) Is the determination by a State Railroad Commission that fast mail and passenger trains engaged wholly in interstate commerce must be stopped at a small town final and conclusive so as to preclude any inquiry by the court in a mandamus proceeding to enforce the order of the Commission into the necessity and reasonableness of such order, or would not the enforcement of the order by the court, without judicially determining its necessity and reasonableness, be a denial of due process of law and the equal protection of the laws? (Assignments 1, 2, and 6.)

II. Assignments 3, 4, 5, 6, 7, 8, 9, 10, and 11, Relate to Control Over Interstate Commerce.

(A) Has a State power and authority to interfere with mail and passenger trains engaged wholly in interstate commerce in other than police matters? (Assignments 4 and 9.)

(B) Even if adequate local facilities are not furnished, has a State power and authority to compel the furnishing of such facilities by requiring fast mail and passenger trains engaged wholly in interstate commerce to make the stops; or is not the extent of State power and authority to compel additional local trains to be furnished? (Assignments 3, 7, and 8.)

(C) The question of providing adequate local facilities not having been an issue in the original petition of the people of

Latta to the Railroad Commission, and not having been considered by such Commission, could the inadequacy of local facilities be used as an excuse to violate the interstate commerce rights of the railroad company? (Assignment 5.)

(D) The question of the railroad company's providing adequate local facilities not being before the Supreme Court of South Carolina, except by way of affirmative defense urged by the defendant railroad company in its answer on the merits, and it appearing that said Supreme Court of South Carolina, after appointing its referee to take the testimony, refused to consider such testimony when a consideration of such testimony would have shown adequate local facilities were provided, could the failure to provide such facilities be made the ground of stopping interstate commerce trains Nos. 32 and 35 at Latta? (Assignment 6.)

(E) Is it only after all local conditions have been met that railroads doing an interstate commerce business have the legal right to adopt special provision for through traffic? (Assignment 10.)

(F) Could the writ of mandamus be framed so as to require trains Nos. 32 and 35 to stop at Latta, with the alternative provision that the duty to provide adequate facilities might be discharged by furnishing facilities substantially the same as those that would be furnished by stopping trains Nos. 32 and 35 when this alternative requirement was undefined, unwarranted, and based upon a question not decided by the court? (Assignment 11.)

Having made this synopsis of the errors raised by the assignments, we shall argue the questions in the order indicated.

It will be observed that, under the assignments of error, two great questions of constitutional law arise, to-wit: due process of law and interstate commerce.

ARGUMENT.

I. DENIAL OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS.

(Assignments of error 1, 2, and 6.)

A. Is the Railroad Commission of South Carolina a Court?

(Assignment 2.)

1. Preliminary.

Before answering the complaint, the defendant, now plaintiff in error, as we have seen, interposed a demurrer, the second ground of which was in part as follows:

"In that the order of the Railroad Commission is not the result of a judicially determined fact, and, the defendant not having had its day in court on the merits of said order, the enforcement of the order of the Railroad Commission deprives defendant of its property without due process of law, and violates the constitutional protection to which defendant is entitled * * * under Article XIV, Section 1, of the Constitution of the United States * * * ." (Demurrer, printed Transcript of Record, p. 12.)

In disposing of this ground of demurrer, the Supreme Court of South Carolina used the following language:

"The second ground of demurrer is as follows:
"II. In that the order of the Railroad Commission is not the result of a judicially determined fact, and the defendant not having had its day in court on the merits of said order, the enforcement of the order of the Railroad Commission deprives defendant of its property without due process of law, and violates the constitutional protection to which defendant is entitled under Article I, Section 5, of the Constitution of the State of South Carolina, and under Article XIV, Section 1, of the Constitution of the United States.
"*The facts were determined by a tribunal well recognized and adopted throughout the land.* The defendant was notified, appeared, and contested the facts upon the merits. In the case of *L. & N. R. Co. vs. Schmidt,* 177 U. S., 230, the court uses this language: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment of the Constitution

of the United States does not control mere forms of procedure *in State courts,* or regulate the practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not have been due process of law, the person condemned has had sufficient notice, and *adequate opportunity has been afforded to defend.'"* (Italics added.) First opinion of court, printed Transcript of Record, p. 16.)

At the second hearing the defendant still contended that it was being deprived of its property without due process of law, and asked that the court consider the testimony and determine upon the necessity and reasonableness of the order. This the court refused to do, saying:

"On the former hearing before this court, the respondent interposed a demurrer to the petition which was overruled.

"One of the grounds of demurrer was: 'In that the order of the Railroad Commission is not the result of a judicially determined fact, and the defendant not having had its day in court on the merits of said order, the enforcement of the order of the Railroad Commission deprives the defendant of its property without due process, etc.'

"The court, in disposing of this ground of demurrer, said: 'The facts were determined by a tribunal well recognized and adopted throughout the land. The defendant was notified, appeared and contested the facts upon the merits.'

"As *the facts were judicially determined by a tribunal empowered by statute to make such adjudication, they are not subject to review by this court,* in the absence of allegations charging fraud or other grounds, for setting aside the adjudication." (Italics added.) (Second opinion of court, printed Transcript of Record, p. 123.)

Manifestly, therefore, the Supreme Court of South Carolina has held three things, to-wit: (1) The Railroad Commission is a court; (2), the hearing before the Commission was such a trial as contemplated by the Constitution of the United States; and, (3), that the order of the Commission was final and conclusive, the sole duty of the court being to enforce it, whether reasonable or not. The holding the Commission a court was laid down as the major premise of the syllogism, hence we first determine its falsity.

It will be observed that the South Carolina Supreme Court did not hold the Railroad Commission a court by reason of any

statute of South Carolina, but laid it down as a proposition of law universally recognized irrespective of statute. The language is: "The facts were determined by *a tribunal well recognized and adopted throughout the land.*" (Italics added.) Since the South Carolina Supreme Court has seen fit to place its holding on the broad ground of a principle of universal law, this court is free to approach the question untrammeled by the rule that, in the construction of a State statute, the Supreme Court of such State has the last word. But, even if this were not the case, this court would have the right to say whether the result of a statute, as constructed by a State Supreme Court, deprived a party of his property without due process of law, or denied to him the equal protection of the laws. *Chicago, M. & St. P. R. Co. vs. Minnesota,* 134 U. S., 418 (33 L. ed., 970).

Since the object of our first inquiry is to determine whether or not the Railroad Commission of South Carolina is a court, logically we must first ascertain the functions with which it is endowed by the statute creating it, for, as was said by the court in *Western Union Telegraph Co. vs. Myatt,* 98 Fed Rep., 346, "it can only be a court in respect of matters of a *judicial nature,* and such as are properly incidental thereto." (Italics added.)

For the convenience of the court we have printed the Railroad Commission law of South Carolina in Appendix A of this Brief, and shall refer to it from time to time in discussing this phase of the question.

Section 2067 gives the Commission general supervision of all railroads, express and telegraph lines within the State, with the right to examine the same "as to their condition and the manner in which they are operated with reference to the security and accommodation of the public and the compliance of the several corporations with the provisions of their characters and the laws of the State."

Section 2068 provides, in substance, that if a railroad fails in any particular to comply with the laws of the State, especially in regard to connections, rates, and schedules, the Commission shall give notice thereof, and in case of continued violation, shall compel performance by an injunction or writ of mandamus, to be issued by the Circuit Court.

By Section 2069 they are given authority to require repairs upon railroads, additions to rolling stock, enlargements or improvements in stations or station houses, modifications in the rates of fare for transporting freight and passengers, and changes in the mode of operating roads and conducting their

business, if they deem these things "reasonable and expedient in order to promote the security, convenience and accommodation of the public"; the railroad company to have sixty (60) days in which to obey, after which the Commission may call upon the Attorney-General to institute proceedings to compel performance.

Section 2070 authorizes them to investigate certain complaints after giving written notice to the railroad, and if upon *examination* they think the complaint is well founded, they shall so adjudge and inform the railroad, which has sixty (60) days to comply, or else be subject to suit to be conducted by the Attorney-General.

By Section 2076 they are given general supervision over all contracts between railroads doing business in the State as to rates of freight and passenger tariffs.

Section 2077 provides that in making any examination they shall have power to issue subpoenas for the attendance of witnesses, and in case any person wilfully fails or refuses to obey such subpoenas, his attendance may be compelled by a Judge of the Circuit Court, who shall have power to atttach him for contempt.

Section 2082 gives them authority to investigate the books of railroad companies, to examine offices, stations, and other places of business, also agents and employees, to procure information for making rates. It further delegates full power to make freight and passenger rates, with the right to procure the attendance of witnesses and the production of evidence.

Sections 2092 and 2093 further prescribe their powers to make rates.

Section 2094 gives them authority to fix the charges for storage of freights.

By Section 2119 it is provided that if any railroad company shall neglect or refuse to comply with the rules and regulations prescribed by the Commissioners "within the limits of their authority, such company shall be subject to a writ of *mandamus*, to be issued by any Justice of the Supreme Court or Circuit Judge, upon the application of the Commissioners."

This analysis of the functions of the Commission, as set forth in the statute creating it, when tested by well-established rules of law, will conclusively determine whether it is a court.

2. The Commission Exercises Administrative and Legislative Functions.

Broadly speaking, the Commission exercises a general supervisory power over all railroads doing business in the State, especially with reference to their roads, stations, rolling stock, appliances, rates for transporting freight and passengers, traffic contracts with each other, and schedules. In so far as this supervisory authority is applied in carrying out the laws already enacted, their duties are purely administrative or ministerial. Of this there can be no doubt.

Under Sections 2069, 2082, 2092, and 2094 (Appendix A), however, the Commissioners are not merely authorized to see that the existing laws are carried out, but are expressly empowered to fix tariffs of rates, to require repairs, additions to rolling stock, improvements in stations, and to make changes in the mode of operating roads and conducting their business. This power cannot be either administrative or judicial, for it is the power to prescribe what shall be done by railroads in future. This power to enact what shall be done or not done by railroads is, of necessity, legislative.

That this is a legislative and not a judicial function is abundantly established by the authorities. Thus in *Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S., 479, 499 (42 L. ed., 253), it is said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative act."

Speaking of the authority of a court to prescribe the facilities and the rates therefor to be furnished by a Railroad Company to an express company using its lines, this court, in the *Express Cases*, 117 U. S., 1, 29 (29 L. ed., 803), has this to say:

"The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and when imposed, it will, if necessary, be enforced by the courts; but, unless a duty has been created,

either by usage or by contract, or by statute, the courts cannot be called on to give it effect."

So in *Chicago & G. T. R. Co. vs. Wellman*, 143 U. S., 339 (36 L. ed., 179), it is said:

"The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Again, in *Reagan vs. Farmers Loan & Trust Company*, 154 U. S., 362, 397 (38 L. ed., 1023), this court says:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function."

The following very clear statement of the law is taken from the able and exhaustive opinion of Judge Hook in *Western Union Telegraph Company vs. Myatt*, 98 Fed., 335, 341:

"The exercise by a State of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered is wholly a legislative or administrative function. The Legislature may, in the first instance, prescribe such regulations and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of Warehouse Commissions, Boards of Railroad Commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. *In prescribing regulations or rules of action under the police power of the State for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered,* they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial

functions is a vital one, and it is not subject to alteration or change either by legislative act or by judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the Legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction." (Italics added.)

The following additional authorities support the rule:

Munn vs. Illinois, 94 U. S., 113 (24 L. ed., 77).
Chicago, B. & Q. R. Co. vs. Iowa, 94 U. S., 155, 183 (24 L. ed., 94).
Peik vs. Chicago & Northwestern R. Co., 94 U. S., 164 (24 L. ed., 97).
Railroad Commission Cases, 116 U. S., 307 (29 L. ed., 636).
Dow vs. Beidelman, 125 U. S., 680 (31 L. ed., 841).
Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418 (33 L. ed., 970).
Budd vs. New York, 143 U. S., 517 (36 L. ed., 247).
St. Louis & S. F. R. Co. vs. Gill, 156 U. S., 649 (39 L. ed., 567).
Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S., 184 (40 L. ed., 935).
Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S., 197 (40 L. ed., 940).
Covington & L. Turnpike Road Co. vs. Sandford, 164 U. S., 578 (41 L. ed., 560).
Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., 684 (43 L. ed., 858).
Chicago & N. W. Ry. Co. vs. Dey, 35 Fed. Rep., 866.
Mercantile Trust Co. vs. Texas & P. R. Co., 51 Fed Rep., 529.

In the light of these authorities further argument is unnecessary to show that the Railroad Commission of South Carolina is empowered to exercise administrative and legislative functions; hence we next inquire if it also possesses judicial powers.

3. Does the Railroad Commission of South Carolina Exercise Judicial Functions?

Looking again to the statute creating it in order to ascertain its powers, we now examine the matters of a judicial nature entrusted to the Railroad Commission. Section 2070 (Appendix A) empowers them to make an *examination* of the condition and operation of a railroad upon complaint made, of which examination they shall give the railroad notice.

Section 2077 (Appendix A) authorizes them to subpoena witnesses to attend their *examination* or investigations, but this can only be enforced by the Circuit Court, the Commission having no authority to attach a witness for contempt for failing to attend. *Nowhere is authority given them to compel attendance of witnesses on behalf of a party defendant before them,* Section 2070 only requiring that reasonable notice of the *examination* be given to the defendant railroad; so that any hearing before them must necessarily be a one-sided affair. Not only is this true, but no authority is given them directly to enforce any of their orders, resort having always to be had to a writ of injunction or mandamus to be issued by the Circuit or Supreme Courts in a suit instituted by the Attorney-General, in which the Commission comes into court as party plaintiff. (Sections 2068, 2069, 2070, 2076, 2119, as set out in Appendix A.) Neither are pleadings or trial according to the forms of law provided for in any part of the statute. These being the powers of the commission, can it be legally or properly called a court? The power to make an examination is judicial, as is the power to subpoena a witness; but it must be a court of very limited authority that can neither attach a witness for contempt nor enforce its order without resort to another tribunal.

That a body having such limited judicial powers, in addition to legislative and administrative powers, is in no sense a court is well established by the authorities. What it takes to make a court is thus stated by Blackstone at page 25 of the third volume of his *Commentaries*:

"In every court there must be at least three constituent parts, the *actor, reus,* and *judex*: the *actor,* or plaintiff, who complains of an injury; the *reus,* or defendant, who is called upon to make satisfaction for it; and the *judex,* or judicial power, which is to examine the truth of the fact, to determine the law arising

upon that fact, and, if any injury appears to have been done, to ascertain and by its officers to apply the remedy."

In *State ex. Rel. Richland Co. vs. Columbia,* 17 S. C., 82, it is said:

"There is necessarily involved in the idea of a court that of a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law."

So in *McKnight vs. James,* 155 U. S., 685, 687 (39 L. ed., 311), this court holds that a Judge at Chambers is not a court in the sense of the Federal Statutes, saying:

"As, under Revised Statutes, Section 709, a writ of error will go from this court only to a final judgment of the highest court of the State in which a decision in the suit can be had, it is evident that our jurisdiction in this case cannot be sustained, unless an order of a judge at chambers, remanding a prisoner in a *habeas corpus* proceeding, can be regarded as an order of a 'court' within the meaning of this section.

"We held, however, in *Carper vs. Fitzgerald,* 121 U. S., 87 (30: 822), that an appeal did not lie to this court from an order of a Circuit Judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus,* for the reason that the Act of March 1, 1885 (23 Stat. at L., 437) gave an appeal to this court in *habeas corpus* cases only from the final decision of a Circuit Court; and that Rule 34 did not make his decision as a judge a decision of the court, the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice, or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court. As a writ of error from this court can only go to the highest court of a State, it follows by analogy that it will not lie to review the order of a judge at chambers.

In the case of *Gurnee vs. Brunswick,* Vol II, Federal Cases, No. 5872, Chief Justice Waite decided that a "Board of Supervisors," created by the laws of the State of Virginia and empowered to pass on and allow claims, was not a court, although certain accounts and claims were presented to them, considered and disallowed, the Attorney-General of the commonwealth representing the county in that proceeding.

The contention was pressed that the proceeding was a suit before a State court. In answer to this, Chief Justice Waite discussed the elements essential to constitute a court as well as a suit.

Amongst other things he said:

"In the *Sewing Machine Cases,* 18 Wall. (85 U. S.) 585, a suit was defined to be 'any proceeding in a court of justice in which a plaintiff pursues his remedy to recover a right or claim.' The board are the representatives of the people elected to supervise the business of the county which has been, by law, committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. A part of their duties is to 'examine, settle and allow accounts chargeable against the county, and, when settled, to issue warrants and levy taxes for the payment. They are the officers charged by law with the duty of auditing claims. Demand of payment must be made on them, they alone represent the county for the purpose. When an account is presented to them it is for allowance, not for adjudication. In settling and allowing they do not act judicially. They simply recognize the claim as valid against the county, and allow it or they reject it. They render no judgment and issue no execution. Their duty is to direct payment of the accounts by the proper officer, and to provide him with the necessary means for that purpose by taxation. When they have made their allowance the account has become liquidated, and may be sued without further demand. All these duties are purely administrative, and the proceeding by which their performance is enforced partakes in no respect whatever of the character of a suit. There are no parties save the claimant and the board; the board occupy one side and the claimant the other. It is true the attorney for the commonwealth is required to represent the county and resist improper allowances, but in this he appears rather as the legal adviser of the board than as the manager of the cause of a litigant. Apply another test. The Act of Congress provides for the removal, under certain circumstances, of any suit of a civil nature, at law or in equity, pending in any State court. If the board were a court and the proceeding before them a suit, the case could have been removed while pending before the appeal. But the right of such removal, we think, will hardly be claimed, for the obvious reason that the relief asked of the board is administrative only and not judicial. They were asked to pay, not to enforce payment. If however, the board disallow the claim and refuse to provide for its payment, judicial action becomes necessary. For this an appeal is given to the courts—not an

appeal from one court to another, but to a court from the executive. By the appeal a suit is commenced and thereafter the proceeding is judicial."

From the foregoing passage it is clear that Chief Justice Waite was of the opinion that to constitute a court there must be a claimant and a defendant; in other words, parties; that there must be a judge acting judicially; that there must be a suit or "proceeding in a court of justice in which a plaintiff pursues his remedy to recover a right or claim," to use the language of this court in the case of the *Sewing Machine Companies*, 18 Wall, 553, 585 (21 L. ed., 922).

A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing that exists only in legal contemplation. A time when, place where, and the persons by whom judicial functions are to be exercised are essential to complete the idea of a court. It is its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptation of the term.

White County Com'rs vs. Gwin, 36 N. E., 237, 136 Ind., 562.

Courts are the only agencies of the law by which a cause can be heard and determined. They are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the State. Its active and potent existence is separate from that of a court. To constitute a court, the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court. The proceedings of a court at a time and place other than that prescribed by law, are void. It is not the act of a court at all.

Johnson vs. Hunter, 50 W. Va., 52, 40 S. E., 448, citing numerous cases.

A preliminary examination before a United States Commissioner is not a proceeding "in any court of the United States" within the meaning of the Federal Statutes.

Todd vs. United States, 157 U. S., 278 (39 L. ed., 982).

Mr. Justice Brewer, in delivering the opinion of the court in the last above mentioned case, quotes, with approval, the following language of Mr. Justice Story:

"A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which jus-

tice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law."

In the case of *Upshur County vs. Rich,* 135 U. S., p. 467 (34 L. ed., 196), Mr. Justice Bradley reviewed all the decisions and deduced the following as the result:

"The principle to be deduced from these cases is that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot in any just sense be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quality, proportion, and value, is not a suit; but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

In *Fuller vs. County of Colfax,* 14 Fed. Rep., 177, 178, the court uses the following language:

"Now, what is usually understood by the words 'court' and 'suit,' where we find them in legislative enactments or in legal proceedings? Blackstone says that a 'court is a place wherein justice is judicially administered.' To administer justice judicially there must be a judge, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially, two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld before the court can act. Then a hearing or trial follows, and the 'justice to be judicially administered' results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this State. They are not clothed with the necessary power to issue compulsory process to bring parties litigant before them. They cannot, in cases like the one under consideration, issue process to compel

the attendance of witnesses. They cannot and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments if they should thoughtlessly undertake to enter them. They have not one party before them on whom their orders can operate. In short, the county board is so totally unlike a court, and so different in its constitution and its objects, that I am unable to see any similarity between them.

"If the county board cannot be regarded as a court, it will follow as a necessary consequence that no suit was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such condition of things existed so long as this claim remained before the county board. But when the appeal was taken and docketed in the district court, we then, for the first time, find a suit pending in the court where none of the elements of either are wanting. It is such a suit that it can be removed from such a court as the removal Acts of Congress contemplate."

So, speaking of the Interstate Commerce Commission in *Kentucky & I. Bridge Co. vs. Louisville & N. R. Co.*, 37 Fed., 567, 612, the court has this to say:

"But does the interstate commerce law undertake either to create an 'inferior court' or to invest the Commission appointed thereunder with judicial functions? We think not. While the Commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as the 'recommendation' of the board, is neither final nor conclusive; nor is the Commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The Commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the Act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for

the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto."

The precise point came before the court in *Western Union Telegraph Co. vs. Myatt,* 98 Fed. Rep., 335, and after a most exhaustive consideration of the authorities, the court reached the conclusion that the court of visitation of Kansas was not a court.

This case is so peculiarly in point that we quote from it at length at pp. 344-345-346:

"What, then, is the nature of the powers conferred upon the court of visitation? It is apparent, from even a cursory examination of those parts of the Act of the Legislature which define the primary powers and jurisdiction of that body, that they are largely of a legislative or administrative character, and such as do not pertain to the functions of a court. It is difficult to define the precise difference between those that are legislative and those that are administrative. It is unnecessary, however, to do so in this case, for it is immaterial whether the powers of that court, so called, aside from those that are judicial, are of the one character or of the other, or are a blending of both. A court does not (to use the language of the Act) 'classify freight' nor 'require the construction and maintenance of depots, switches, sidetracks, stock yards, cars, and other facilities for the public convenience,' nor 'regulate crossings and intersections of railroads,' nor 'regulate the operation of trains' over such crossings and intersections, nor 'prescribe rules concerning the movements of trains to secure the safety of employees and the public,' nor 'require the use of improved appliances and methods to avoid accidents and injuries to persons,' nor 'apportion transportation charges among connecting carriers,' nor 'regulate charges for part carload and mixed carload lots of freight, including live stock,' nor 'prescribe what rates of transportation of freight and passengers shall be charged.' The regulation of such matters is legislative in its character, not judicial. *The Express Cases, supra.* Of course, courts of chancery, in the exercise of their equity jurisdiction, may, and frequently do, through the medium of receivers appointed by them, exercise some of such powers in the administration of property which is the subject-matter of litigation in such courts, and especially where, in order to preserve the value of such property while it is in the possession of the court, it is necessary to continue the operation thereof and maintain it as a going concern. But it is not in such sense that these powers were conferred

upon the court of visitation. Courts also have the undoubted power to determine some of these matters, if they properly lie in the road to the ultimate adjudication of other existing controversies concerning which the adjudication of the court has been invoked; as, by way of illustration, where, in litigation over the destruction of life or property in a railroad accident, it becomes material to ascertain whether the company used proper appliances and methods to avoid such an occurrence. Nor is it to this end that the powers mentioned were conferred upon the court of visitation. The exercise of the powers granted contemplates the prescribing of rules and regulations for future guidance, and the possession of such powers by the court of visitation makes it one of the potential agencies of the legislative department of the State. To use the expression of a learned Justice of the Supreme Court, the court of visitation, in respect of such functions, is 'an active, seeking, supervising body; the eye and the activity of the State.' As to such powers and duties the court of visitation is not, and cannot be a court. Practically all of the powers then possessed by the Board of Railroad Commissioners of Kansas, which was purely an administrative body, were conferred upon the court of visitation, and as an evidence of the legislative purpose and intent, the then existing laws relating to the appointment, powers, and duties of the Board of Railroad Commissioners were, by Act of the Legislature, repealed a few days after the passage of the Act creating the court of visitation. Both Acts were passed at the same legislative session; the latter, by its terms, taking effect March 15, 1899, and the repealing Act, by its terms, taking effect the first Monday of April of the same year.

"It was argued at the bar, on behalf of the defendants, that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9, of Section 8, of the Act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any

sense the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act. To use the language of the Supreme Court of Kansas in *The Auditor vs. Railroad Co.*, 6 Kan., 509:

" 'It certainly could not be so in the sense in which our Constitution uses the term, or it would, of necessity, obliterate the lines by which the framers of that instrument sought to keep separate and distinct the three branches of our government.'

"As was said in *Re Huron*, 58 Kan., 156, 48 Pac., 576, 36 L. R. A., 824:

" 'Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer.'

"Counsel say:

" 'The decision of a question which may arise between different railroad companies as to how much a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive.'

"That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the court of visitation. The intent of the Act of the Legislature was not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the State and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?

"The fact that the Legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and powers conferred upon it. That question is not determined by the terminology employed in the Act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. The Constitution of the State of Kansas authorizes the creation of courts inferior to the Supreme Court by Act of the Legislature, and, by necessary implication, the defining of the jurisdiction of the courts so created. Article 3, Paragraph 1. Nevertheless, such jurisdiction must, in all essential particulars, be judicial in its character, and the constitutional authority for other courts than those specifically named in the Constitution must be so construed and limited. Under

the Constitution the Legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal, as constituted by legislative Act, may be denominated a court, may possess a seal, and be clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise. The Legislature may create a court of visitation, but it can only be a court in respect to matters of a judicial nature, and such as are properly incidental thereto."

In *August Busch & Co. vs. Webb,* 122 Fed., 655, it was held that the Commissioners' Court of a county in Texas, in declaring and publishing the result of an election, acts ministerially and is not a court within the meaning of Revised Statutes, Section 720. On page 665 the court said:

"The contention of the defendants that the Commissioners' Court of Grayson County is a court within the meaning of the law, and that their action cannot be restrained by an injunction, as contemplated by Section 720 of the Statutes of the United States (U. S. Comp. St. 1901, p. 581), to my mind, is without merit. The duty of said body to declare the result of said election and to publish such result is purely ministerial and in no wise judicial. It is true that many duties of a court proper are mi[illegible]erial, but they are clothed with judicial functions, such as deciding litigated questions between litigants, etc. The Commissioners' Court is not a court, in my opinion, within the meaning of said Article 720 of the Revised Statutes, and, therefore, this contention cannot be sustained."

In the case of *Louisville & Nashville R. R. Co. vs. Brown,* 123 F. R., 946, an injunction was granted against the Florida Railroad Commission. The point was made that this was an injunction against a State court. Dealing with this point Judge Pardee said:

"The main contention of the respondents is: that as the legislative Act which creates and defines the powers and authority of the Railroad Commission, vests in said Commission 'judicial powers to do or enforce or perform any function, duty, or power conferred upon them by the Act to the exercise of which judicial power is necessary,' the said Commission, in performing the various powers and duties vested in the Commissioners by the Act, is a State court, within the meaning of Section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901,

p. 581), which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a State. An inspection of the Act of the Legislature of the State of Florida creating the Railroad Commission shows that, as is usual in such cases, the Commission is vested with executive, legislative and quasi-judicial powers, but does not show that the Commission is in any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property."

Indeed, since it is clearly established that the South Carolina Railroad Commission possesses legislative functions, it cannot have judicial functions in addition thereto, as that would violate the rule of constitutional law requiring the departments of government forever to be kept separate. Thus in *Kilbourn vs. Thompson,* 103 U. S., 168 (26 L. ed., 387) the court, through Judge Miller, states the law in the following language:

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But, while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

The precise question arose in *Western Union Telegraph Co. vs. Myatt,* 98 Fed. Rep., 335, and after thoroughly reviewing the authorities, the court held that the court of visitation of Kansas, being endowed with legislative functions, could not, in addition thereto, exercise judicial functions, as that would violate the fundamental rule that the legislative and judicial depart-

ments of the government must be kept separate. The following authorities also support the rule:

Cooley's Constitutional Limitations (7th edition), pp. 126-134.
2 *Elliott on Railroads,* Section 677.
Dash vs. Van Kleeck, 7 Johns, 477.
In Re Sims, 54 Kans., 1, 25, L. R. A. 110, 45 Am. St. Rep., 261..
Kansas vs. Johnson, 61 Kans., 803, 49 L. R. A., 662.

These authorities are so absolutely conclusive of the question that it would be but a work of supererogation to multiply them.

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4. The Commission is Not a Court, But Merely an Administrative Board.

The inevitable conclusion following from the principles of law laid down by the authorities above cited, is that the Railroad Commission is not a court as that term is understood in the jurisprudence of the English-speaking world. Being endowed chiefly with administrative and legislative functions, it can exercise only quasi-judicial functions in addition thereto. Such a body is known to the law as an administrative board and not a court of justice. In the recent case of *Mississippi Railroad Commission vs. Illinois Central Railroad Co.* (*MSS.*), decided December 3, 1906, this very point arose, and the court disposed of it in the following language:

"It is also objected that an injunction will not lie from a United States Court to stay proceedings in a State Court, because of the provisions of Paragraph 720, United States Revised Statutes (U. S. Comp. Stat. 1901, p. 581). *The Commission is, however, not a court, and is a mere administrative agency of the State,* as held by the Mississippi court. *Western U. Telg. Co. vs. Mississippi Railroad Commission,* 74 Miss., 80, 21, So. 15.

"It is urged, however, that proceedings in a State court were commenced by the presentation of the petition of the citizens of Magnolia to the Railroad Commission, and because the Commission, having made an order to stop the trains, would have to resort to the proper State court to aid it in the enforcement of its order, therefore, the whole proceeding must be regarded as in a State court from the commencement. Whatever may

be the provision in the State statute in regard to the enforcement solely by the State court of the order of the Railroad Commission, the proceeding while before the Commission never thereby became a proceeding in a State court, and the jurisdiction of the Federal court to enjoin the Commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected." (Italics added.)

Again, in *Reagan vs. Farmers Loan & Trust Company*, 154 U. S., 362, 393 (38 L. ed., 1022), this court declared the law in these words:

"Passing from the question of jurisdiction to the Act itself, there can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a Commission. *Such a Commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. Stone vs. Farmers Loan & T. Co. (Railroad Commission Cases)*, 116 U. S., 307 (29:636)." (Italics added.)

Examination shows that the Mississippi Commission was very similar to that of South Carolina.

The case of *Chicago, M. & St. P. R. Co. vs. Minnesota*, 134 U. S., 418 (33 L. ed., 970), is to the same effect, and it should be noticed also that the powers of the Railroad Commission there under consideration were precisely similar to those of the South Carolina Commission.

So we take it, instead of being well recognized throughout the land as a court, the Railroad Commission of South Carolina is, according to indisputable principles of law, nothing more than an administrative board.

Having determined that the Railroad Commission of South Carolina is not a court, we pass on the next branch of the inquiry, to-wit:

B. Was the Hearing Before the Railroad Commission Due Process of Law?

(Assignments 1 and 2.)

1. Holding of South Carolina Supreme Court and Its Error.

By reference to its opinion, it will be seen that the South Carolina Supreme Court held that, inasmuch as the Railroad Commission was a court, and inasmuch as the railroad company had been notified and had appeared and contested the matter, all requirements of due process of law had been met, for the reason that under the case of *Louisville & N. R. Co. vs. Schmidt*, 177 U. S., 230, the due process of law clause of the Fourteenth Amendment cannot control forms of procedure or regulate the practice in State courts, it requiring only sufficient notice and adequate opportunity to defend. (First opinion of court, printed Transcript of Record, p. 16.) This holding was practically repeated in the second opinion, when the court refused to consider the facts, held the order of the Commission final and conclusive, and proceeded to enforce it without making the slightest inquiry as to its reasonableness. (Second opinion of court, printed Transcript of Record, p. 123.) That this was error we shall now proceed to show.

By way of preliminary, we may remark that it is now well settled that a corporation is a person within the purview of the Fourteenth Amendment to the Constitution, and, therefore, entitled to the protection it affords.

Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., 684 (43 L. ed., 858).
Smyth vs. Ames, 169 U. S., 466, 522 (42 L. ed., 840).
Gulf C. & S. F. Ry Co. vs. Ellis, 165 U. S., 150, 154 (41 L. ed., 668).
Charlotte, C. & A. R. R. vs. Gibbes, 142 U. S., 386, 391 (35 L. ed., 1054).
Santa Clara County vs. Southern Pac. R. Co., 118 U. S., 394, 396 (30 L. ed., 118).

We make no question of the soundness of the principle quoted by the court from *L. & N. R. Co. vs. Schmidt;* but we do contend that it has no application to the facts of this case. In that case *all the proceedings were had in the regularly constituted courts of Kentucky,* and ample opportunity to defend was afforded the railroad company under the rule to show cause.

This court said: "Forms of procedure in the State courts are not controlled by the Fourteenth Amendment, *provided the fundamental rights secured by the amendment are not denied.*" (Italics added.) It was further held in that case *that adequate opportunity must be afforded to defend.*

Plainly, therefore, *L. & N. R. Co. vs. Schmidt* contemplates a trial by a court, and when it is shown that the Railroad Commission is not a court, the rule it lays down with reference to procedure in State courts has no application. Even if it were a court, adequate opportunity must be afforded to defend, and its final action must not deny fundamental rights. *Chicago, B. & Q. R. Co. vs. Chicago,* 166 U. S., 226 (41 L. ed., 984). But since the Commission is not a court, so far as matters of a judicial nature are concerned, *it cannot possibly afford an opportunity to defend,* for the very obvious reason that it possesses none of the machinery of a court. Nor is this all. The fundamental rights secured by the Amendment must not be denied, and, as we shall show later, the holding final and conclusive the order of the Commission denied fundamental rights of the railroad company.

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2. Character of the Hearing Before the Commission at Latta.

In paragraphs XV and XVI of the Statement of the Case, *supra,* it appears that on July 18, 1904, the Railroad Commission notified Mr. W. N. Royall, General Superintendent of the railroad company, that they had "decided before taking final action in the matter of the train service rendered the people of Latta *to make a personal visit to Latta,*" where they would be glad to have him meet them on July 25th. (Printed Transcript of Record, p. 70.) On the date set, a railroad attorney and superintendent met with two of the Commissioners at Latta, and a conference was held. This meeting was a kind of free discussion of the situation, with not even the semblance of a trial. Indeed, the Commissioners at no time notified Mr. Royall that a trial would be had at Latta at that time, but merely stated that they would be glad to have him attend a *personal inspection* they were going to make there. Nothing was said about his being on hand with witnesses to contest the claims of the people of Latta, and *even if they had,* as we have seen, *they were absolutely without authority either to compel the attendance of witnesses* ON THE PART OF A PARTY DEFENDANT *or*

to pass judicially on any matter coming before them. Yet this mere conference the Supreme Court of the State of South Carolina has seen fit to characterize as a hearing fulfilling all the requirements of the due process of law clause of the Fourteenth Amendment.

Did the hearing afford due process of law? We think it may be laid down as an incontrovertible proposition of law that a hearing on a purely judicial question in order to constitute due process of law must be afforded a party as a matter of right, and not as a matter of grace. On this point we should like to direct the attention of the court to an able and exhaustive article by Hon. A. Caperton Braxton, on the Virginia State Corporation Commission, in No. 1, Vol. X, of the Virginia Law Register (May, 1904), (published also in the American Law Review). In this article Mr. Braxton elaborately considers the powers of a railroad commission, and reaches the conclusion that a hearing before such a body is not due process of law.

We take it that "due process of law implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding." 2 Coke, Inst., 47, 50; *Hoke vs. Henderson,* 4 Dev. (N. C.), 15; *Taylor vs. Porter,* 4 Hill 146; *Wynehamer vs. People,* 13 N. Y., 393; *Cooley's Const. Lim.,* 575 *et seq.* This principle is directly applicable to the facts of this case, for not a single one of its requirements have been met in the proceedings before the South Carolina Railroad Commission.

Coming down more particularly to the facts of this case, in order for the alleged hearing before this many-functioned court to have constituted due process of law, necessarily the proceedings must have been had in a regularly instituted suit. But that proceedings before such a board cannot be a suit is well settled law, as will appear from the decision of this court in *Upshur County vs. Rich.,* 135 U. S., 467 (34 L. ed., 199). The following language of Mr. Justice Bradley in that case, reviewing all the authorities, conclusively establishes that a proceeding before an administrative board, such as the South Carolina Railroad Commission, is not a suit, and does not become a suit until it reaches a "court of justice":

"The question, What is a 'suit' in the sense of the judiciary laws of the United States? has been frequently considered by this court. Reference may be made particularly to the following cases: *Weston vs. Charleston,* 27 U. S., 2 Pet., 449, 464

(7:481, 485); *Kendal vs. United States*, 37 U. S., 12 Pet., 524 (9:1181); *Holmes vs. Jennison*, 39 U. S., 14 Pet., 540, 566 (10:579, 585); *Ex Parte Milligan*, 71 U. S., 4 Wall., 2, 112 (18:281, 291); *Kohl vs. United States*, 91 U. S., 367, 375 (23:449, 452); *Gaines vs. Fuentes*, 92 U. S., 10, 21, 22 (23:524, 527, 528); *Mississippi & R. R. Boom Co. vs. Patterson*, 98 U. S., 403, 406 (25:206, 208); *Ellis vs. Davis*, 109 U. S., 485, 497 (27:1006, 1010); *Hess vs. Reynolds*, 113 U. S., 73, 78 (28:927, 929); *Pacific Railroad Removal Cases*, 115 U. S., 1, 18 (29:319, 325); *Searl vs. School Dist. No. 2*, 124 U. S., 197, 199 (31:415, 417); *Delaware County vs. Diebold Safe & Lock Co.*, 133 U. S., 473, 486, 487 (33:674, 680).

"In the four cases first cited, this court determined that writs of prohibition, mandamus and habeas corpus, prosecuted for the attainment of the parties' rights, are suits within the meaning of the law, the judgments upon which, in proper cases, may be removed into this court by writ of error. In *Weston vs. Charleston*, Chief Justice Marshall said: 'Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceedings by which the decision of the court is sought is a suit.' This definition is quoted with approbation by Chief Justice Taney in *Holmes vs. Jennison*, which was a case of habeas corpus, and by other judges in subsequent cases.

"*Mississippi & R. R. Boom Co. vs. Patterson*, *Pacific Railroad Removal Cases*, and *Searl vs School Dist. No. 2*, were cases of the assessment of the value of lands condemned for public use under the powers of eminent domain. The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this Act of Congress. In *Mississippi & R. R. Boom Co. vs. Patterson*, the company was authorized by the State laws of Minnesota to take land for the purpose of its business, and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the District Court, where it was to be entered by the clerk 'as a case upon the docket,' the land owner being designated as plaintiff and the company as defendant. The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and de-

termined. Issues of fact were to be tried by a jury, unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company, subject to review by the Supreme Court of the State on writ of error. This mode of proceeding was followed. The Boom Company and the land owners both appealed from the award of the Commissioners. When the case was brought before the District Court, the owner, being a citizen of another State, applied for and obtained its removal to the Circuit Court of the United States, where it was tried before a jury and a judgment was rendered upon their award. We held that the appeal in that case was a suit within the meaning of the Act of Congress authorizing the removal of causes from the State to the Federal Courts. Mr. Justice Field, speaking for the court, said: 'The proceeding in the present case before the Commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the Commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.'

"In *Delaware County vs. Diebold Safe & Lock Co.*, it was held that where a claim against a county is heard before County Commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the Circuit Court of the United States.

"The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quality, proportion and value, is not a suit; but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

In the leading case of *Chicago, M. & St. P. Ry. Co. vs. Minnesota,* 134 U. S., 418 (33 L. ed., 970), the facts were briefly these: Complaint was made to the Railroad Commission of Minnesota by certain parties to the effect that the rates of the Chicago, Milwaukee & St. Paul Railway Company for the transportation of milk were excessive. Accordingly, a conference was held at the office of the Commission, the company appearing by its attorney, and the complaint was investigated. As a result an order was made reducing the rates on milk, which was subsequently sought to be enforced by a writ of mandamus issued by the Supreme Court of Minnesota. From the decision of that court the case came to this court on a writ of error, and this court reversed the judgment awarding the writ, holding that such a hearing as was accorded to the railroad company deprived it of its property without due process of law.

The precise question again arose in *Mercantile Trust Co. vs. Texas & P. R. Co.,* 51 Fed Rep., 529, 542, where the facts and rulings thereon were as follows:

"One of the counsel for the cross complainants, who was present before the Commission at Austin on the said 6th of July, 1891, and the several following days, to answer for his road, describes that assize as 'a sort of general experience meeting;' and another one of the counsel, who was also present for the same purpose, pictures it as a kind of Chautauqua class where free lectures on the general subjects of railroad freights, classifications, and rates were invited from all comers, which could result in nothing, unless a Babel, with its confusion of tongues. The defendant Commissioners say in their answer: 'The said conference, beginning on July 6, 1891, lasted for several days, and all freight rates in Texas were discussed and considered;' and again: 'Defendants aver that the session begun July 6, 1891, has never terminated or been adjourned at all, and that all the rates complained of in said bill, or which have ever been fixed by said Commission, have been fixed at the session aforesaid'; and again: 'Defendants further admit that said Commission is proposing and proceeding to make and promulgate other rates and tariffs without other formal notice than that dated June 20, 1891.'

"The suggestion that the proceedings here indicated constitute 'due process of law,' within the meaning of the provisions of the Constitution, or 'an investigation by judicial machinery,' within the meaning of the decisions of the Supreme Court, can hardly be seriously made by the sound lawyers who have appeared to resist these motions. And the subject is too grave for jest. *U. S. vs. Lee,* 106 U. S., 196, 1 Sup. Ct. Rep., 240;

Poindexter vs. Greenhow, 114 U. S., 270, 5 Sup. Ct. Rep., 903, 962; *Railway Co. vs. Minnesota,* 134 U. S., 418, 10 Sup. Ct. Rep., 462; *Jones vs. Robbins,* 8 Gray, 329; *City of Louisville vs. Cochran,* 82 Ky., 15."

So it is not the mere fact that the defendant was notified and appeared that constitutes due process of law. The protection afforded by the Amendment is more substantial than that, for in the carrying out of the rights guaranteed by the Constitution, this court looks to substance rather than form. Therefore, in ascertaining whether proceedings of a court—and much more so of an administrative board such as a Railroad Commission—the inquiry must always be directed to determining whether the fundamental rights guaranteed by the Amendment have been faithfully preserved to the party condemned. The law on this subject is thus well stated by Mr. Justice Harlan in *Chicago, B. & Q. R. Co., vs. Chicago,* 166 U. S., 226, 234 (41 L. ed., 984):

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice, according to the modes of proceeding applicable to such case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirements of due process of law. *United States vs. Cruikshank,* 92 U. S., 542, 554 (23:588, 592); *Leeper vs. Texas,* 139 U. S., 462, 468 (35:225, 227). But a State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authority may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law, regard must be had to substance, not to form."

To the same effect is *Fayerweather vs. Ritch,* 195 U. S., 276, 297 (49 L. ed., 209).

Again, in *Charles vs. City of Marion,* 98 Fed. Rep., 168, it is said:

"It is not sufficient to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved."

In the light of these authorities we deem it unnecessary to pursue further this branch of the subject, and, therefore, leave it to enter upon the larger and more comprehensive inquiry embraced in the third question arising under this head, to-wit:

C. Is the Determination by a State Railroad Commission That Fast Mail and Passenger Trains Engaged Wholly in Interstate Commerce Must be Stopped at a Small Town Final and Conclusive so as to Preclude any Inquiry by the Court in a Mandamus Proceeding to Enforce the Order of the Commission Into the Necessity and Reasonableness of Such Order; or Would Not the Enforcement of the Order by the Court, Without Judicially Determining Its Necessity and Reasonableness, be a Denial of Due Process of Law and the Equal Protection of the Laws?

(*Assignments 1, 2, and 6.*)

1. Preliminary

Before proceeding to a discussion of the questions here raised, it would be well to get clearly in mind the exact position taken by the South Carolina court in the matter. The railroad company demurred to the complaint as failing to state a cause of action for the reason that the order of the Commission was not the result of a judicially determined fact, and that to enforce it without giving the company its day in court on the merits of the order would deprive the company of its property without due process of law. This ground of demurrer the court overruled, holding that the Railroad Commission was a court, and, therefore, its order was a judicially determined fact. Notwithstanding this holding, the court, on motion of the Attorney-General, appointed its referee to take the testimony, presumably for the purpose of trying the merits of the case; but when the trial was had, the court refused to consider the testimony, saying: "As the facts were judicially determined by a tribunal

empowered by statute to make such adjudication, they are not subject to review by this court, in the absence of allegations charging fraud or other grounds for setting aside the adjudication." (Second opinion, printed Transcript of Record, p. 123.) Here is an absolute holding that the finding and order of the Commission were final and conclusive under the terms of the statute, and the court's only duty was to enforce it. If such be the proper construction of the South Carolina statute (and it is the proper construction so far as this court is concerned), does it not accomplish a result that denies to the railroad company its rights under the Fourteenth Amendment to the Constitution? That it does, it is now our purpose to show.

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2. The Requiring of Trains to Stop in Order to Furnish Additional Facilities is a Legislative Function.

In order to determine whether the order of the Commission requiring trains Nos. 32 and 35 to stop at Latta was final and conclusive, and, therefore, a denial of due process of law and the equal protection of the laws, it will be necessary to analyze the functions exercised by the Commission in promulgating that order. It is quite clear that the requiring adequate local facilities to be furnished at Latta by stopping certain trains was a legislative act on the part of the Commission, as is well settled by numerous authorities. Thus in the *Express Cases,* 117 U. S., 1 (29 L. ed., 803), where the question was as to the right of a court to prescribe the facilities that should be furnished by a railroad company to an express company using its line, this court said:

"The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power we do not doubt."

Speaking of the functions of a Railroad Commission, the court in *Western Union Tel. Co. vs. Myatt,* 98 Fed Rep., at p. 341, uses this language:

"*In prescribing regulations or rules of action under the police power of the State for the safety and convenience of the public,*

or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals." (Italics added.)

To the same effect are:

Munn vs. Illinois, 94 U. S., 113 (24 L. ed., 77).

Chicago, B. & Q. R. Co. vs. Iowa, 94 U. S., 155 (24 L. ed., 94).

Peik vs. Chicago & Northwestern R. Co., 94 U. S., 164 (24 L. ed., 97).

Railroad Commission Cases, 116 U. S., 307 (29 L. ed., 636).

Dow vs. Beidelman, 125 U. S., 680 (31 L. ed., 841).

Chicago, M. & St. Paul R. Co. vs. Minnesota, 134 U. S., 418 (33 L. ed., 970).

Minneapolis Eastern R. Co. vs. Minnesota, 134 U. S., 467 (33 L. ed., 985).

Chicago & G. T. R. Co. vs. Wellman, 143 U. S., 339 (36 L. ed., 179).

Budd vs. New York, 143 U. S., 517 (36 L. ed., 247).

Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362 (38 L. ed., 1023).

St. Louis & S. F. R. Co. vs. Gill, 156 U. S., 649 (39 L. ed., 567).

Cincinnati, N. O. & T. P. vs. Interstate Commerce Commission, 162 U. S., 184 (40 L. ed., 935).

Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S., 197 (40 L. ed., 940).

Covington & L. Turnpike Road Co. vs. Sandford, 164 U. S., 578 (41 L. ed., 560).

Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co., 167 U. S., 479 (42 L. ed., 253).

Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., 684 (43 L. ed., 858).

3. The Right to Say Whether an Order Requiring Trains to Stop in Order to Furnish Additional Facilities is Necessary and Reasonable is a Judicial Function, and to Hold Final and Conclusive a Legislative Body's Action Thereon Denies Due Process of Law.

But while the requiring of a railroad company to stop trains or provide conveniences is a legislative function, the power to declare such requirement necessary and reasonable, and, therefore, valid, *rests exclusively with the judicial department of the government, and can in no sense be exercised by the legislative branch.* This distinction is important and fundamental as one going to the very foundations upon which all republican government rests. It is one thing for the Legislature to enact a law, but quite another for it to say that that law is final and conclusive, and the only thing left for the citizen to do is to render obedience thereto. The first is a legitimate exercise of the functions of government; the second is tyranny under the guise of legal forms.

Before proceeding with the argument, we may say that we fail to see anything in the recent case of *Atlantic Coast Line R. Co. vs. North Carolina Corporation Commission,* Sup. Ct. United States, filed April 29, 1907, that militates in the slightest against the view we take of this branch of the case. In that case it was insisted that the order of the Corporation Commission, approved by the courts of North Carolina, requiring the defendant company to make connection with the train of the Southern Railway at Selma, N. C., was so inherently unjust and unreasonable because of the nature of the burden necessarily imposed as to amount to taking property without due process of law. It appears that the Commission found it a matter of physical impossibility for the defendant to make the connection with its through train, but that such could be done either by extending the run of two local trains or by putting on a new train. Putting on the new train was deemed the most feasible by all parties, and this court held that the operation of such train, although it resulted in a daily loss to the defendant, was not a denial of due process of law, because the facts of the case showed that the net earnings of the road were such that adequate remuneration would result to it from its general operations in the State despite this loss, and this being so, the defendant should perform its duty of supplying the public with facilities.

The doctrine we contend for was not and could not have been involved in that case. The Commission passed on the facts three separate times, then the matter was taken to the courts. All the issues were then tried *de novo* before the Superior Court of Wake County, North Carolina, and a jury, and from the judgment rendered therein an appeal was taken to the Supreme Court of the State, which thoroughly reviewed the facts. The case then came to this court and another thorough examination of the facts was made. It thus appears *that the defendant was not condemned until after the fullest judicial investigation of the facts;* and, therefore, there could be no question of the proceedings not being due process of law. The case at bar is totally different. *The Commission was not only without authority to pass judicially on the facts, but it had no facts before it upon which to pass.* The case then came before the State Supreme Court, *which held that the Commission's finding was final and conclusive, and the sole duty of the court was to enforce it, and refused to determine the merits of the case, although it had appointed a referee to take the testimony.* Had this testimony been considered, the order made could not have been passed; and *this condemnation without a trial we contend was a denial of due process of law.* In this contention we think we are fully sustained by the authorities.

Ever since Chief Justice Marshall pronounced his famous judgment in *Marbury vs. Madison*, 1 Cranch, 137, to the effect that a law in conflict with the Constitution is void, it has been an established principle in the constitutional law of this country that the Legislature is entrusted with the duty of making laws, but the power to pass upon their validity rests exclusively with the judicial department of the government. If this be the law with reference to the Legislature, which is a branch of the government coördinate with the courts, much more must it be with reference to a Commission discharging legislative functions.

Coming down to the facts of this case, the authorities are overwhelmingly against the ruling of the South Carolina Supreme Court. Before referring to the decisions, we quote from a few text-books of well-recognized authority. Thus in a note at page 874 of the seventh edition of *Cooley's Constitutional Limitations* it is said:

"A State cannot empower a Commission to fix rates finally without opportunity for a judicial hearing on the question of their reasonableness."

In Section 574 of the latest edition (1906) of *Hutchinson on Carriers*, we find the following clear statement of the law:

"Where the State may regulate the rates to be charged, it is competent to establish a board or commission to carry the regulations into effect; but an Act which makes the action of such a board or commission final and exclusive of judicial review is void, as depriving the carrier of the equal protection of the law and depriving him of his property without due process of law."

Turning to the decisions, what do we find the courts have said on the subject? Universally and uniformly they have declared that the right to say whether requirements with reference to rates, facilities and matters of that character are reasonable and proper rests with the courts, and to make the order of a Railroad Commission thereon final and conclusive takes the property of the defendant railroad company without due process of law, and denies to it the equal protection of the laws. The leading case in this country appears to be *Chicago, M. & St. P. Ry. Co. vs. Minnesota*, 134 U. S., 418 (33 L. ed., 970), which is so nearly on all fours with the case at bar as, in our view, to be practically conclusive of it. Being so directly in point, we take the liberty of referring to it at length. The facts were these: The Legislature of Minnesota enacted a statute creating a Railroad and Warehouse Commission endowed with functions very similar to those of the South Carolina Railroad Commission, as will appear by examination of the two statutes. This being the case, "on the 22d of June, 1887, the Boards of Trade Union of Farmington, Northfield, Faribault and Owatonna, in Minnesota, filed with the Commission a petition, in writing, complaining that the Chicago, Milwaukee and St. Paul Railway Company * * * made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis, which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield, and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the Commission should declare to be equal and reasonable."

The Commission forwarded this complaint to the railway company, and called upon it to satisfy or answer the said complaint on a certain date. The assistant general manager of the road then wrote to the Commission denying that the rates were unreasonable, and alleged on the contrary that they were unreasonably low. "On the 13th day of July, 1887, at the office of the Commission in St. Paul, the company appeared by J. A. Chandler, its duly authorized attorney, and the Boards of Trade Union by its attorney, and the Commission proceeded to investigate the complaint. An investigation of the rates charged by the company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis, was made by the Commission, and it found that the charges of the company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were three cents per gallon in ten-gallon cans, that such charges were unequal and unreasonable, and that the company's tariff of rates for transporting milk from Owatonna and Faribault to those cities * * * was unequal and unreasonable; and the Commission declared that a rate of two and one-half cents per gallon in ten-gallon cans was an equal and reasonable rate for such services." The Commission then proceeded to promulgate its order to the effect that two and one-half cents per gallon was a reasonable and proper charge; but the company refused to adopt the rates prescribed by the Commission. Thereupon the Commission, through the Attorney-General, applied to the Supreme Court of the State for a writ of mandamus to compel the railway company to adopt the tariff of rates prescribed by it. The court issued an alternative writ of mandamus returnable before it on December 14, 1887. The company in due time filed its return, wherein it set up, *inter alia*, that the order of the Commission deprived it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"The case came on for hearing upon the alternative writ and return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the Commission was reasonable, fair and just. The court denied the application for a reference, and rendered judgment in favor of the relator and that a peremptory writ of mandamus issue," holding that the order of the Commission was final and

conclusive. An application for a reargument was made and denied, and the case was then brought to this court by writ of error.

From this review of the facts it is evident that this case differs from the one at bar in only two particulars, to-wit: There the Commission was fixing rates instead of requiring facilities, but the two things are identical in principle; and there the court refused to appoint a referee, while here it appointed the referee, and then refused to consider the testimony reported by him, so that the two are practically identical in every particular.

In this state of facts, this court said:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive, and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the Commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the Commission if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to

it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

"Under Section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the Commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the Commission is required to do is, on the filing with it by the railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the Commission 'shall declare to be equal and reasonable,' and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and, although in the present case it appears that prior to the decision of the Commission the company appeared before it by its agent, and the Commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

In this same case Mr. Justice Miller delivered a concurring opinion, which is such a clear presentation of the law governing this class of cases that we quote it in full:

"I concur, with some hesitation, in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions:

"1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

"2. The power which the Legislature has to do this can be exercised through a Commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the Act now under consideration.

"3. Neither the Legislature nor such Commission acting under the authority of the Legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for

such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the Commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the Legislature or by the Commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the services rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

"8. *But in the present case, where an application is made to the Supreme Court of the State to compel common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief, that it would have if called upon to do so by a bill of chancery.*

"9. I do not agree that it was necessary to the validity of the action of the Commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the Legislature to have given such notice if it had established such rates by legislative enactment.

"10. But, when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed, on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void." (Italics added.)

This opinion of Mr. Justice Miller is very important, for the reason that *it unequivocally holds that in the mandamus proceeding to enforce the order of the Commission, the court could and should have tried the question of reasonableness, and that its refusal to receive evidence on that subject deprived the company of its property without due process of law.* In the subsequent case of *St. Louis & S. F. Co. vs. Gill*, 156 U. S., 649, 659 (39 L. ed., 571), this court, in a unanimous opinion written by Mr. Justice Shiras, quoted this opinion of Mr. Justice Miller as a correct exposition of the law. So it may now be regarded as the established law of this court. Such being the settled law, the error of the South Carolina Supreme Court in refusing to consider the testimony is quite palpable,—but we pass on.

The case of *Minneapolis Eastern Ry. Co. vs. Minnesota*, 134 U. S., 467 (33 L. ed., 985), was very similar to that of *Chicago, M. & St. P. Ry. Co. vs. Minnesota, supra*, the Commission there fixing the rates for transferring cars, but without any hearing accorded the railroad. The doctrine of *Chicago, M. & St. P. Ry. Co. vs. Minnesota* was, therefore, reaffirmed.

So in the *Railroad Commission Cases*, 116 U. S., 307 (29 L. ed., 644), this court said:

"From what has been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without a reward; neither can it do that in law which amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Reagan vs. Farmers Loan & Trust Company*, 154 U. S., 362 (38 L. ed., 1014), the Farmers' Loan & Trust Company, as trustee of a certain railroad company, instituted a suit to enjoin such railroad company and the Railroad Commission and Attorney-General of Texas from putting or continuing in effect certain rates that had been fixed by the said Commission as reasonable and proper after a hearing accorded to certain railroads similar to the conference held at Latta (see 51 Fed. Rep., at p. 542): The bill alleged the rates were unreasonable and unjust, and the United States Circuit Court for the Western District of Texas so held them, and accordingly granted an injunction, not only restraining their adoption, but, in addition, forbidding the Railroad Commission either from discharging any duties under the Act or from establishing reasonable rates and regulations. On appeal this court reversed the two last mentioned requirements of the decree, but affirmed the portion of it enjoining the defendants from enforcing the rates already made.

In this case Mr. Justice Brewer makes an elaborate review of the cases, and at page 399 announces the conclusion of the court in the following words:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment. no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of the one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and

the machinery of government, with all of their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *St. Louis & S. F. Co. vs. Gill*, 156 U. S., 648, 657 (39 L. ed., 570), this court had before it the question of the reasonableness of rates for transportation as fixed by a State Legislature, and stated the law in the following language:

"There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such Acts of legislation to be in conflict with the Constitution of the United States as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Stone vs. Farmers Loan & Trust Co.*, 116 U. S., 331 (29:644); *Dow vs. Beidelman*, 125 U. S., 681 (31:841), 2 Inters. Com. Rep., 56; *Chicago, M. & St. P. R. Co. vs. Minnesota*, 134 U. S., 418 (33:970), 3 Inters. Com. Rep., 209; *Chicago & G. T. R. Co. vs. Wellman*, 143 U. S., 331 (36:176); *Reagan vs. Farmers Loan & T. Co.*, 154 U. S., 362 (38:1014), 4 Inters. Com. Rep., 560."

So in *Smyth vs. Ames*, 169 U. S., 466 (42 L. ed., 819), the question of reasonableness of rates again arose. There the plaintiff, as stockholder in certain railroad companies, procured an injunction from the United States Circuit Court of Nebraska restraining the Board of Transportation of that State from enforcing an Act of the Legislature prescribing rates of transportation, on the ground that such Act was repugnant to the Constitution of the United States. Upon appeal to this court, the decree of the Circuit Court awarding the injunction was duly affirmed. This court said (pp. 527-528):

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the Legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. * * *

"What are the considerations to which weight must be given, when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualify them to so handle great problems of transportation as to do justice to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the Legislature of the State has declared such to be the case; for that would make the State Legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. Article 6. The idea that any Legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

So again in *Western Union Tel. Co. vs. Myatt*, 98 Fed. Rep., 335, where the powers of the Kansas Railroad Commission, called a Court of Visitation, were under discussion, the court said, at page 342:

"Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no

longer open to question. It is firmly fixed in the body of our jurisprudence. *Reagan vs. Trust Co.*, 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. ed., 1014; *Smythe vs. Ames*, 169 U. S., 466, 18 Sup. Ct., 418, 42 L. ed., 819. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public service, because that is a legislative prerogative, and that the Legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

But it is needless to pursue the inquiry further, and we merely refer without quotation to other cases supporting the rule:

Chicago & G. T. Ry. Co. vs. Wellman, 143 U. S., 339 (36 L. ed., 176).

Covington & Lexington Turnpike Road Co. vs. Sandford, 164 U. S., 578 (41 L. ed., 560).

Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S., 479 (42 L. ed., 243).

Lake Shore & M. S. Ry. Co. vs. Smith, 173 U. S., 684 (43 L. ed., 858).

Kentucky & I. Bridge Co. vs. Louisville & N. R. Co., 37 Fed. Rep., 567.

Interstate Commerce Commission vs. Lehigh Valley R. Co., 49 Fed. Rep., 177.

Clyde vs. Richmond & D. R. Co., 57 Fed. Rep., 436, 439.

Southern Pac. Co. vs. R. R. Commissioners, 78 Fed. Rep., 236, 261.

Note discussing *Munn vs. Illinois*, 62 Am. St. Rep., 289.

But it may be argued that these cases holding that the reasonableness of rates is a question for judicial determination have no application. Upon what ground could this argument possibly rest? Solely on the assumption that in fixing rates the Commission is exercising a totally different function from that it exercises when determining that facilities must be furnished. But in each case the function, according to both reason and authority, is wholly legislative, and, therefore, the ac-

tion must of necessity be identical. This being true, the reasonableness of an order requiring certain facilities to be furnished requires and demands judicial investigation and determination just as much so as does an order requiring certain rates to be adopted. Therefore the cases deciding that the reasonableness of rates must be determined by judicial inquiry in the regularly constituted courts, in order to afford to a party due process of law, are exactly analogous to the case at bar and conclusive of it. Prior to the decision of this case, the courts of South Carolina had never held that any legislative Act, whether passed by the Legislature or some of its agencies, could be final and conclusive so as to preclude any inquiry by the courts into its reasonableness as depriving a citizen of his property without due process of law. Indeed, in the case of *State vs. Earle*, 66 S. C., 194, such a doctrine was distinctly repudiated under the authority of the decisions of this court we have cited above, and it is impossible to see how the Supreme Court of that State reconciled its action in that case and the one at bar, especially in view of the fact that both that case and the one reaffirming it, *Thomasson vs. Southern R. Co.*, 72 S. C., 1, were called to the court's attention in the petition for a rehearing. (Petition for rehearing, printed Transcript of Record, p. 132).

From the authorities cited it is clear that in requiring additional facilities at Latta the Railroad Commission was discharging a legislative function, while in determining finally and conclusively that this requirement of additional facilities was necessary and reasonable, it was exercising judicial powers. A totally different role is played when the Commission consults with the Attorney-General and institutes suit to enforce its order; so that this so-called court is permitted to act as legislator, judge, and prosecutor in the same case. Can proceedings before such a many-functioned body be due process of law? We think the authorities above cited conclusively demonstrate that they cannot.

It is fundamental that a party cannot be judge in his own cause. Says Judge Cooley in his treatise on *Constitutional Limitations*, seventh edition, p. 594:

"If the Legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the

province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly."

It is clearly established by the case of *Western Union Telegraph Co. vs. Myatt*, 98 Fed. Rep., 335, that the Fourteenth Amendment to the Constitution of the United States insures to every citizen protection against confiscation of his property by the acts of a tribunal which is not in reality a court, and that it violates the Federal Constitution to clothe any single body of men with power to act as legislators, judges and executioners in reference to the same matter. We quote at p. 354:

"In view of what has been said of the court of visitation, and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the Fourteenth Amendment to the Constitution? Due process of law in judicial proceedings means a course of legal proceedings acording to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings, it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts cannot legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, cannot render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law."

The reasoning of this case is admirable and conclusive, and the citation of authority is well-nigh exhaustive.

So in *Dash vs. Van Kleeck*, 7 Johns., 477, Chancellor Kent, speaking of an act combining the exercise of legislative and judicial functions, says:

"It is a well settled axiom that the union of these two powers is tyranny."

Again, *in Kilbourn vs. Thompson*, 103 U. S., 168 (26 L. ed., 384), this court says:

"No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no 'person shall be deprived of life, liberty, or property without due process of law,' the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is governed by rules of law previously established. An Act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution."

The authorities cited above, to the effect that the question of reasonableness of legislation cannot be determined by the same body that legislates, rest on practically the same ground; so that we content ourselves with merely calling attention to them in addition to

Pennoyer vs. Neff, 95 U. S., 217 (24 L. ed., 572).
Hurtado vs. People of California, 110 U. S., 516 (28 L. ed., 238).
Leeper vs. Texas, 139 U. S., 462 (35 L. ed., 227).
State ex rel. Godard vs. Johnson, 61 Kan., 803, 49 L. R. A., 662.

In the light of the principles above set forth escape is impossible from the conclusion that the Supreme Court of South Carolina erred in holding final and conclusive the order of the Railroad Commission requiring trains Nos. 32 and 35 to stop at Latta, and that in enforcing it without judicially determining whether the order was necessary or reasonable, the defendant railroad company was deprived of its property without due process of law, and denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Such being the conclusion, it necessarily follows that the evidence reported by the referee should have been considered and the rights of the railroad judicially determined by the State Supreme Court after such consideration in the mandamus proceeding.

It will not do to say that the court did consider the evidence because it made in its statement of facts a short and incomplete extract from the testimony of General Passenger Agent Craig (second opinion of court, printed Transcript of Record, pp. 122-123.) *That it had any intention to consider the evidence at all is distinctly repudiated by the court when it says the finding of the Commission is final, conclusive, and not subject to review.* (Second opinion of court, printed Transcript of Record, p. 123.) The court not only holds the order final and conclusive, but, in addition, declares that the only question to be decided is whether the enforcement of the order so made would be a burden on interstate commerce. (Second opinion of court, printed Transcript of Record, p. 123.) But even if this were not true, we respectfully submit that the defendant railroad company was entitled to have the testimony of all its four witnesses duly weighed and considered, and not be condemned by quoting a mere excerpt from the testimony of one of its witnesses.

Consideration of the undisputed evidence, as submitted by the court's own referee, would have shown that adequate accommodations were already furnished at Latta; that trains Nos. 32 and 35 were engaged wholly in interstate commerce and carriage of the mails, and that if they were made locals the defendant would lose both its tourist travel and the mail contract, which would mean a heavy financial loss, inasmuch as the interstate transportation of passengers was very large and the amount of mail very heavy. (Printed Transcript of Record, pp. 94 to 119, and especially pp. 96 and 116.)

In these circumstances, does it require any argument to show that the enforcement of the order would deprive the railroad company of valuable property rights? We think not, for it would hardly be contended that the loss of through travel and the transportation of the mails by their being diverted to faster competing lines does not constitute a property loss. Indeed, it was shown in testimony that so important was this interstate travel that train No. 32 averaged one hundred (100) passengers per day for a considerable time from Florida points to Richmond, Va. (Printed Transcript of Record, p. 96.)

Another fact we desire to call to the court's attention is that the South Carolina Supreme Court *denied the defendant due process of law in order to enforce an order imposing a burden on interstate commerce.* Since this is the effect of the order, it affords an additional ground for the court to hold that defend-

ant has been deprived of its property without due process of law, and denied the equal protection of the laws by the State court's refusal to pass judicially upon the necessity and reasonableness of the order stopping the trains.

Since it is so conclusively shown that the enforcement of the order of the Commission, without judicially determining its necessity and reasonableness, is a deprivation of property without due process of law, and a denial of the equal protection of the laws, we most earnestly submit that assignments of error 1, 2, and 6, raising these questions, should be sustained, and the judgment of the Supreme Court of South Carolina reversed.

This brings us to the second main question involved in the case, to-wit: control over interstate commerce.

II. CONTROL OVER INTERSTATE COMMERCE.

(Assignments 3, 4, 5, 6, 7, 8, 9, 10, and 11.)

A. Has a State Power and Authority to Interfere in Other Than Police Matters With Fast Mail and Passenger Trains Engaged Wholly in Interstate Commerce?

(Assignments 4 and 9.)

Since by Clause 3, Section 8, of Article I, of the Constitution of the United States Congress is given power to regulate commerce among the several States, the inquiry here is as to how far State authority can affect interstate commerce under our dual form of government. Manifestly a State cannot regulate interstate commerce, for that is placed in the jurisdiction of Congress, but, on the other hand, there is nothing to forbid State action, provided it does not amount to regulation. Under the decisions of this court, matters of purely internal concern are rightfully within the domain of State authority as being a proper exercise of the reserved police power of the States. *Chicago, B. & Q. R. Co. vs. Illinois*, 200 U. S., 561, 584, 50 L. ed., 606. No sufficiently comprehensive definition of the police power, it is said, has ever been given, but it is clear that all matters concerning the public health, safety, morals, welfare, and convenience fall within its scope. As was said by this court in *Bacon vs. Walker*, decided February 4, 1907, the police power "embraces regulations designed to promote the public

convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." Without attempting to make any exhaustive citation of authority, we merely refer, in addition, to the following cases as sustaining the rule:

Chicago, B. & Q. R. Co. vs. Illinois, 200 U. S., 561, (50 L. ed., 596).
Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285 (43 L. ed., 702).
Hannibal, etc., R. Co. vs. Husen, 95 U. S., 465 (24 L. ed., 527).
Stone vs. Mississippi, 101 U. S., 814 (25 L. ed., 1079).
Webber vs. Virginia, 103 U. S., 344 (26 L. ed., 565).
Robbins vs. Shelby Taxing District, 120 U. S., 489 (30 L. ed., 694).

But, granting that to the States is reserved the power to enact laws for promoting the public health, the public morals, the public safety, the public welfare, and the public convenience, yet from this it does not follow that in the guise of making regulations for such purposes a State may directly burden and control interstate commerce. We take it that if such regulations help rather than hinder interstate commerce they are valid, but when they transcend this and impose a burden, they must fall. Is such the law? We think it is, as laid down by this court.

In *Henderson vs. Mayor of New York,* 92 U. S., 259 (23 L. ed., 549), we find this court saying:

"It is clear from the nature of our complex form of government that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."

So in *Hannibal, etc., R. R. Co. vs. Husen,* 95 U. S., 465 (24 L. ed., 529), it is said:

"It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate

commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States, to Congress, in the same words in which it is given to the other, and in both cases it is necessarily exclusive."

Again the court further says:

"Whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government."

In *Leisy vs. Hardin*, 135 U. S., 100 (34 L. ed., 132), this court says:

"While by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. *Henderson vs. New York City*, 92 U. S., 259 (23:543); *Hannibal & St. J. R. Co., vs. Husen*, 95 U. S., 465 (24:527); *Walling vs. Michigan*, 116 U. S., 446 (29:691); *Robbins vs. Shelby County Taxing Dist.*, 120 U. S., 489 (30:694)."

Numerous other decisions of this court might be cited to the same effect, but so conclusive are those already referred to that it would be but a work of supererogation to attempt to add thereto.

Applying the above principles, it conclusively appears that the interference in other than police matters by a State with fast mail and passenger trains engaged wholly in interstate commerce is invalid.

Having determined that under the police power a State cannot regulate interstate commerce, we are led to consider the second inquiry presented under this branch of the case, namely:

B. Even if Adequate Local Facilities are Not Furnished, Has a State Power and Authority to Compel the Furnishing of Such Facilities By Requiring Fast Mail and Passenger Trains Engaged Wholly in Interstate Commerce to Make the Stops; or is Not the Extent of State Power and Authority to Compel Additional Local Trains to be Furnished.

(Assignments 3, 7, and 8.)

The proposition for which we here contend is that a State cannot require trains engaged wholly in interstate commerce and carriage of mails to make stops in order to accommodate local needs, but that the extent of State authority is to provide for local conditions by requiring local trains to be run. In other words, is requiring mail and passenger trains wholly engaged in interstate commerce to be stopped for accommodating local needs a legitimate exercise of the police power of a State?

Though the precise question here presented has not been authoritatively settled by any decision of this court, yet several closely analogous cases have been decided that have an important bearing upon it.

The first case in which the question of stopping trains arose was *Illinois Central R. Co. vs. Illinois*, 163 U. S., 142 (41 L. ed., 107). There the effect of the statute of Illinois, as construed and applied by the Supreme Court of that State, was "to require a fast mail train, carrying interstate passengers and the United States mail from Chicago, in the State of Illinois, to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route and running to a station three and one-half miles away from a point on that route, and back again to the same point, and thus traveling seven miles, which formed no part of its course before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station for the interstate travel to and from which," as was admitted in the case, the railroad company furnished other and ample accommodation. Such being the facts, this court held the requirement as "unconstitutional hinderance and obstruction of interstate commerce and of the passage of the mails of the United States."

It will be observed that the question of stopping this train in order to provide local facilities was not an issue in the case, but the sole question was whether this train should be required to furnish *additional interstate facilities* when they were already sufficient. This being true, the question here raised could not possibly arise.

Following the case just cited came *Gladson vs. Minnesota*, 166 U. S., 427 (41 L. ed., 1064). In that case the train sought to be stopped ran wholly within the State of Minnesota, whose statute expressly provided that it should not apply to through trains entering the State from other States, or to transcontinental trains. In this state of facts it was held no interference with interstate commerce to require it to stop at county seats.

Then came *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S., 285 (43 L. ed., 702), where the statute of Ohio requiring that each railway company should stop three, each way, of its regular passenger trains, if so many were run daily, at stations, cities, or villages containing over three thousand inhabitants, was held valid. There was a very strong dissent in this case by four of the justices, on the ground that the statute interfered with interstate commerce; but be that as it may, we see nothing in the case at all inconsistent with the proposition we are now contending for, and we think we are borne out by the following language of the court at p. 301:

"The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers."

The whole tenor of the opinion is to the effect that a State has authority to compel a railroad to run a sufficient number of trains to provide for local needs. Moreover, it should be noted that there the effort was not to have particular trains stop in order to provide local accommodations, but the decision went solely to the power to legislate as to providing for the public convenience by furnishing facilities. Under the decision as rendered, the railroad sued was not required to stop its interstate commerce trains at all, but merely to run trains for the convenience of local travel.

The next case decided by this court on the question of stopping trains, was *Cleveland, C. C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514 (44 L. ed., 868).

That was a case in which a writ of mandamus was filed by one of the State's attorneys in the State of Illinois to compel the defendant railway company, which for several years had operated, and was then operating, a railroad from St. Louis, Mo., through the County of Montgomery and the City of Hillsboro, the county seat of such county, to Indianapolis, Ind., to stop a regular passenger train known as the "Knickerbocker Special," at the City of Hillsboro, a sufficient length of time to receive and let off passengers with safety.

The petition was based upon a section of the statutes of the State of Illinois which required each passenger train to stop at all regular stations. The defendant answered:

"That the company furnished four regular passenger trains each way a day, passing through and stopping at Hillsboro, and that they amply accommodated the travel and afforded every reasonable facility to such city; that the Knickerbocker Special was a train specially devoted to carrying interstate transportation between the City of St. Louis and the City of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train which connected with other similar trains on the Lake Shore and New York Central Roads, and that it was necessary to put on this train because the trains theretofore run, none of which has ever been taken off, could not, by reason of stopping at Hillsboro and other similar stations, make the time necessary for eastern connections, or carry passengers from St. Louis to New York within the time which the demands of business and interstate traffic required; that the Knickerbocker Special is not a regular passenger train for carrying passengers from one point to another in the State of Illinois, such traffic being amply provided for by other trains, and that the Knickerbocker Special is used exclusively for interstate traffic from and to points without the State of Illinois; that it is not subject to regulation by the State of Illinois providing that all trains shall stop at all county seats, and that to subject it to the statutes of the various States through which it passes, requiring it to stop at county seats, would wholly destroy the usefulness of the train, and would impede and obstruct interstate commerce, and that obedience to the statute in question would require it to abandon the train."

A demurrer to the answer was sustained, and on a writ of error sued out to the United States Supreme Court, the order sustaining the demurrer to the answer was reversed.

This decision, besides being exactly in point with the case at bar, is interesting in that the Supreme Court of the United States has undertaken to say, in review of all the authorities, in what cases local legislation, State or municipal, can and cannot interfere with interstate commerce trains; and the result of this review of the authorities is that a State by legislation can do nothing which will directly burden or impede the interstate traffic of a railroad company or impair the usefulness of its facilities for such traffic, except by such legislation as has for its object the personal security and health of passengers when traveling through the State. In other words, all such legislation as can interfere with interstate commerce traffic is limited to the incidental measures that may be authorized as police regulations.

In this case the court says: "In the earliest of these cases (*Illinois C. R. Co. vs. Illinois,* 163 U. S., 142), the very statute of Illinois under consideration in this case, as construed and applied by the Supreme Court of that State, was held to be an unreasonable restriction upon interstate traffic, in requiring a fast mail train from Chicago to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of its interstate passengers and United States mail by turning aside from its direct route and running to a station (Cairo) three and one-half miles away from a point on that route, and back again to the same point, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for whom the railroad company furnished other and ample accommodation. Said Mr. Justice Gray: 'The State may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States.'"

The court in this case distinguishes the case of *Gladson vs. Minnesota,* 166 U. S., 427, in that it shows in that case that the legislation was directed solely to the management of trains, not interstate trains, operated solely in the State of Minnesota.

The court also in this case distinguishes the case of *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S., 285, when it shows that the legislation in that case was directed towards the requirement of better local accommodations, in requiring a certain number of trains to stop at a certain station, and clearly shows that this is a very different proposition from the requirement by legislation that an interstate commerce train should stop at a certain station for local requirements.

Quoting further, the court says:

"The question presented in this case is this: Whether a State statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train, designated especially for local traffic, may stop at the same station within a few minutes before or after the arrival of the train in question.

"The demurrer to the answer admits that the railway company furnishes a sufficient number of regular passenger trains (four each way a day) to accommodate all the local and through business along the line of the road, and that all of such trains stop at Hillsboro; that none of such trains have been taken off, and all of which ran prior to the putting on of the Knickerbocker Special, still run and still stop at Hillsboro, and that they furnish ample and sufficient accommodation to all persons desiring to travel to and from that place; that the Knickerbocker Special was put on in response to an urgent demand on the part of the through traveling public from St. Louis to New York, and that it was necessary, as the passenger trains theretofore used could not, by reason of stopping at way stations, make the time required for eastern connections, and if compelled to stop at county seats the company will be compelled to abandon the train, to the great damage of the traveling public and to the railway company.

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might in some cases render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the Legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel, where there were competing

lines unhampered by such regulations. While, as we held in the Lake Shore Case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches, or sleeping berths, nor the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

"With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the States shall be free and unobstructed.

"While the statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall vs. De Cuir,* 95 U. S., 485, 24 L. ed., 547, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others.' The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and

whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort, and convenience of their patrons—is too obvious to require discussion. *Railroad Commission Cases*, 116 U. S., 307, 334, (*sub. nom. Stone vs. Farmers Loan & T. Co.*), 29 L. ed., 636, 645, 6 Sup. Ct. Rep., 334, 388, 1191.

"We are of the opinion that the Act in question is a direct burden upon interstate commerce, and the judgment of the Supreme Court of the State of Illinois must, therefore, be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

It will be observed in this case that *the court has not decided that an interstate commerce train can be interfered with by local legislation in the event that local conditions are disregarded.* It has only decided on the question of demurrer, where it was admitted that local conditions were fully met, that in such a case the interstate commerce train could not be interfered with. It did not decide, or undertake to decide, that if these local conditions were not fully met, in that event local legislation could interfere with interstate commerce trains. On the contrary, the entire reasoning of the court is against such a proposition.

The language of the court in distinguishing *Lake Shore & M. S. R. Co. vs. Ohio, supra,* is so pertinent that we quote it:

"This case is readily distinguished from the one under consideration, in the fact that the statute of Ohio required only that three regular passenger trains should stop at every station containing three thousand inhabitants, *leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois has effectually closed.*" (Italics added.)

Mr. Justice Brewer and Mr. Justice Shiras, in their concurring opinion, have this to say:

"We concur in this judgment on the proposition that the Act of the Legislature of Illinois, whether reasonable or unreasonable, wise or foolish, is, as applied to the facts of this case, an attempt by the State to directly regulate interstate commerce, and, as such attempt, is beyond the power of the State."

The last utterance of this court on the subject was in *Mississippi R. R. Commission vs. Illinois Central R. Co.*, decided December 3, 1906. In that case the Railroad Commission of Mississippi, acting under authority of statutes enacted by the Legislature of that State giving to it discretionary power to require all passenger trains to stop at all county seats where there was a depot, or at such depots as the public convenience might require, after a hearing had before it, made an order requiring the fast interstate mail trains Nos. 1 and 3 of the Illinois Central Railroad to stop at Magnolia, a town of some twelve hundred inhabitants, situated in southern Mississippi. On appeal this court held the order of the Commission illegal and void as being an unconstitutional interference with interstate commerce and the passage of the United States mails.

Such being the decisions of this court on the power to stop trains, is any one justified in saying that if a railroad company is not furnishing adequate local facilities it is proper for State authority to convert its interstate commerce trains into locals rather than compel it to run the number of trains necessary to supply local needs?

The proposition we deny is that a State has any authority to compel interstate commerce trains already running to stop in order to provide local facilities, rather than requiring the railroad to run the number of purely local trains necessary to provide for local needs. Under a proper regard for the separate and distinct powers of the State and Federal Governments, such would seem to be the only logical deduction possible; and we maintain that nothing contrary thereto has ever been decided by this court. And why do we say this? Simply because no case has ever been decided where interstate commerce trains were stopped to provide for local facilities; indeed, the only cases referring to the question at all were cases where it was either *admitted or proved that abundant local facilities were already furnished,* hence no additional facilities were required.

The belief that it is proper to furnish local facilities by requiring interstate commerce trains to stop and thus impose a serious burden upon interstate traffic, rather than require more local trains within the limits of State authority, has sprung from an improper consideration of the case of *Cleveland, C. C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514; but we venture to think that when properly understood, that case bears no such interpretation. In that case the answer set up, *inter alia*, that four passenger trains a day each way stopped at Hillsboro,

which afforded ample accommodations for all the travel, both local and through, of that city. To this answer, *the plaintiff interposed a demurrer,* which was sustained and a writ of mandamus awarded. This ruling was affirmed by the State Supreme court on appeal. *Necessarily the demurrer admitted that sufficient accommodations were already furnished, and, hence, more facilities of any kind were not needed.* The court neither said, nor pretended to say, that the proper way to provide local facilities was to stop trains engaged wholly in interstate commerce and not require more local trains. The attitude of the court was more like this: *An abundance of accommodations is admitted, and, therefore, there is no reason to ask for more, and to allow this particular train to be stopped would be permitting a burden upon interstate commerce, which cannot be.* The court did not say that it would not equally be a burden upon interstate commerce to require them to stop even if the local facilities were not adequate; and we submit that it would be. Requiring the trains to stop *at all* would be both impeding the interstate traffic of the company, and impairing the usefulness of its facilities for such traffic, and under the decisions of the court this would constitute an unconstitutional interference with interstate commerce. So, as we interpret this decision, it directly supports our contention, for it certainly does say that to interfere with an interstate train when local facilities are admitted to be adequate, is illegal and void; and since the burden on interstate commerce comes from the stopping of such a train, manifestly the purpose for which it is desired to have such a train stopped can have no bearing whatever on the case.

Nor do we see anything in the recent case of *Mississippi Railroad Commission vs. Illinois Central R. R. Co., supra.* inconsistent with our contention. It is true, that the learned justice who wrote the opinion in that case does say that a State Railroad Commission could, if adequate accommodations for a particular locality were not otherwise furnished, compel a train engaged wholly in interstate commerce to stop at such locality; but in our view, while all deference should be given it as coming from such a source, it can only have the force of dicta, *for the reason that the question did not arise in the case.* Careful examination of the case shows that it was clearly proved that adequate local facilities were already supplied, so that, like the *Cleveland, C. C. & St. L. R. Co. vs. Illinois* case, *supra, the question was whether interstate commerce trains could be stopped when local accommodations were furnished, and not*

whether such trains could be stopped by State authority in order to provide such accommodations when they admittedly did not exist. This language of Mr. Justice Peckham was doubtless founded on the case in 177 U. S., cited above, where there was a demurrer admitting local accommodations to be sufficient, and is to be explained by that case.

The point really decided in the case from Mississippi was that when local facilities are proved to be sufficient, interstate trains cannot be interfered with. The converse of this proposition could not be decided then, for the reason that it could not be before the court; and anything said in reference thereto must necessarily be dicta; and being dicta is subject to the famous criticism of Chief Justice Marshall in *Cohens vs. Virginia*, 6 Wheaton, 399, so often quoted:

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (Italics added.)

Since this court has never held that a State may burden interstate commerce by requiring trains engaged wholly in such commerce to stop at given localities not having sufficient accommodations, but which could be amply supplied with such accommodations by additional local trains required to be run by authority of the State, we now proceed to inquire if such a thing can be legally done under the decisions of this court.

The question is as to the proper line of demarcation between the police power of the States and the power over interstate commerce entrusted exclusively to Congress. The test to be applied, therefore, is that laid down in the decisions of this court marking out the respective limits of the police power and interstate commerce. If stopping trains engaged wholly in interstate commerce and carrying of mails, even though it seriously impedes their progress and greatly impairs their usefulness, is not laying a burden on interstate commerce, it is valid; otherwise it is illegal and void.

This brings us to a discussion of the relative domains of the police power and of interstate commerce.

Subject to certain qualifications to be hereafter mentioned, it may be stated as a general proposition that the police power resides exclusively in the States and the control of interstate commerce exclusively in the National Government; and that in their operation each must keep within its own sphere. Numerous decisions of this court have laid down this principle, and to some of these we shall now advert.

Thus in *Brown vs. Maryland*, 12 Wheat., 419, 448 (6 L. ed., 689), this court, speaking through Chief Justice Marshall, says:

"It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation."

Speaking of this question, the court in *Hannibal, etc., R. Co. vs. Husen*, 95 U. S., 465 (24 L. ed., 529), uses this language:

"It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress, in the same words in which it is given over the other, and in both cases it is necessarily exclusive."

Again: "Whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government."

In *Brown vs. Houston*, 114 U. S., 622 (29 L. ed., 260), it is said:

"It may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations."

So again in *United States vs. E. C. Knight Co.*, 156 U. S., 1, 11 (39 L. ed., 329), the court says:

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

Without further quotation, we merely refer to the following cases as sustaining the rule:

Gibbons vs. Ogden, 9 Wheat., 1 (6 L. ed., 23).
Sinnot vs. Davenport, 22 How., 227 (16 L. ed., 243).
Crandall vs. Nevada, 6 Wall., 35 (18 L. ed., 746).
State Freight Tax Case, 15 Wall., 232 (21 L. ed., 163).
Welton vs. Missouri, 91 U. S., 1 (23 L. ed., 347).
Henderson vs. New York, 92 U. S., 259 (23 L. ed., 543).
Hall vs. DeCuir, 95 U. S., 485 (24 L. ed., 547).
Pensacola Tel. Co. vs. W. U. Tel Co., 96 U. S., 1 (24 L. ed., 708).
Mobile County vs. Kimball, 102 U. S., 691 (26 L. ed., 259).
Western U. Tel. Co. vs. Texas, 105 U. S., 460 (26 L. ed., 1067).
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196 (29 L. ed., 158).
Wabash, etc., R. Co. vs. Illinois, 118 U. S., 557 (30 L. ed., 244).

Robbins vs. Shelby Taxing District, 120 U. S., 489 (30 L. ed., 696).
Western Union Tel. Co. vs. Pendleton, 122 U. S., 347 (30 L. ed., 1187).
Bowman vs Chicago & N. W. R. Co., 125 U. S., 465 (31 L. ed., 700).
Ratterman vs. Western U. Tel. Co., 127 U. S., 411 (32 L. ed., 229).
Leloup vs. Mobile, 127 U. S., 640 (32 L. ed., 311).
Asher vs. Texas, 128 U. S., 129 (32 L. ed., 368).
Leisy vs. Hardin, 135 U. S., 100 (34 L. ed., 128).
Minnesota vs. Barber, 136 U. S., 313 (34 L. ed., 455).
Brimmer vs. Rebman, 138 U. S., 78 (34 L. ed., 862).
Harmon vs. Chicago, 147 U. S., 396 (37 L. ed., 216).
Scott vs. Donald, 165 U. S., 58 (41 L. ed., 632).
Rhodes vs. Iowa, 170 U. S., 412 (42 L. ed., 1088).
Vance vs. Vandercook, 170 U. S., 438 (42 L. ed., 1100).
Schollenberger vs. Pennsylvania, 171 U. S., 1 (43 L. ed., 49).
American Express Co. vs. Iowa, 196 U. S., 133 (49 L. ed., 417).

While it is true as a general rule that the police power and interstate commerce occupy exclusive and separate fields, yet this but roughly describes the relations they bear to each other. More strictly speaking, the subjects of interstate commerce fall into two classes, namely, those in which the States may act in the absence of legislation by Congress, and those in which the action of Congress is exclusive and the States cannot interfere at all. The earlier decisions manifested a tendency to make the jurisdiction of Congress exclusive over the whole subject, but this gradually relaxed until the decision in *Cooley vs. Board of Wardens,* 12 Howard, 300, 319 (13 L. ed., 1005), where the law was declared in these words:

"The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

"Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose

sight of the nature of the subjects of this power and to assert concerning all of them what is really applicable but to a part. *Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.*" (Italics added.)

Subsequent cases have followed this ruling; so now the settled rule governing the subject is that laid down in *Leisy vs. Hardin*, 135 U. S., 100 (34 L. ed., 136), to-wit:

"The doctrine now firmly established is, as stated by Mr. Justice Field in *Bowman vs. Chicago & N. W. R. Co.*, 125 U. S., 507 (31:714), 'that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and *admits* and *requires* uniformity of regulation, affecting alike all the States, *such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations.* The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." (Italics added.)

Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204 (38 L. ed., 962), is a notable case discussing the different phases of interstate commerce and police regulations. Mr. Justice Brown exhaustively reviews the authorities on the class of regulations that a State may make in the absence of congressional action, and we merely refer to his review of the decisions without attempting to add anything to them:

"Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots (*Cooley vs. Philadelphia Port Wardens*, 53 U. S., 12 How., 299 [13:996]; *Pacific Mail SS. Co. vs. Joliffe*, 69 U. S., 2 Wall., 450 [17:805]; *Ex Parte McNeill*, 80 U. S., 13 Wall., 236 [20:624]; *Wilson vs. McNamee*, 102 U. S., 572 [26:234]); quarantine and inspection laws and the policing of harbors (*Gibbons vs. Ogden*, 22 U. S., 9 Wheat., 1, 203 [6:23,

71]; *New York vs. Miln*, 36 U. S., 11 Pet., 102 [9:648]; *Turner vs. Maryland*, 107 U. S., 38 [27:370]; *Morgan's L. & T. R. & SS. Co. vs. Louisiana Board of Health*, 118 U. S., 455 [30:237]); the improvement of navigable channels (*Mobile County vs. Kimball*, 102 U. S., 691 [26:238]; *Escanaba & L. M. Transp. Co. vs. Chicago*, 107 U. S., 678 [27:442]; *Huse vs. Glover*, 119 U. S., 543 [30:487]); the regulation of wharves, piers and docks (*Cannon vs. New Orleans*, 87 U. S., 20 Wall., 577 [22:417]; *Keokuk N. L. Packet Co. vs. Keokuk*, 95 U. S., 80 [24:377]; *Northwestern U. Packet Co. vs. St. Louis*, 100 U. S., 423 [25:688]; *Cincinnati, P. B. S. & P. Packet Co. vs. Cattleburg*, 105 U. S., 559 [26:1169]; *Pittsburg & O. R. Transp. Co. vs. Parkersburg*, 107 U. S., 691 [27:584]; *Ouachita & M. R. Packet Co. vs. Aiken*, 121 U. S., 444 [30:976], 1 Inters. Com. Rep., 379); the construction of dams and bridges across the navigable waters of a State (*Wilson vs. Black Bird Creek Marsh Co.*, 27 U. S., 2 Pet. 245 [7:412]; *Cardwell vs. American River Bridge Co.*, 113 U. S., 205 [28:959]; *Pound vs. Turck*, 95 U. S., 459 [24:525], and the establishment of ferries (*Conway vs. Taylor*, 66 U. S., 1 Black, 603 [17:191]).

"Of this class of cases it was said by Mr. Justice Curtis, in *Cooley vs. Philadelphia Port Wardens*, 53 U. S., 12 How., 299, 318 (13:996, 1004), 'If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that a mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations.' See also *Sturges vs. Crowninshield*, 17 U. S., 4 Wheat., 192, 193 (4:547, 548). But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. *Pennsylvania vs. Wheeling & B. Bridge Co.*, 59 U. S., 18 How., 421 (15:435)."

As is pointed out in the case we have just been discussing, there is a class of regulations that come within the exclusive jurisdiction of a State, namely, those concerning the strictly internal commerce of the State and but remotely bearing upon interstate commerce. Thus a statute protecting the public from fraud and deception by prohibiting the sale of oleomar-

garine colored in imitation of butter (*Plumley vs. Massachusetts*, 155 U. S., 461, 39 L. ed., 221); a statute requiring all locomotive engineers to be licensed (*Smith vs. Alabama*, 124 U. S. 465, 31 L. ed., 508); a statute requiring all railroad employees to be examined for color-blindness (*Nashville, etc., R. Co. vs. Alabama*, 128 U. S., 96, 32 L. ed., 352); a statute requiring railroad companies to fix and post their rates annually (*Chicago, etc., Ry. Co. vs. Fuller*, 17 Wall., 560, 21 L. ed., 710); a statute prohibiting the consolidation of competing or parallel lines of railroad (*Louisville & N. R. Co. vs. Kentucky*, 161 U. S., 677, 40 L. ed., 849); a statute penalizing a telegraph company for negligently failing to deliver a message, even from without the State (*Western Union Tel. Co. vs. James*, 162 U. S., 650, 40 L. ed., 1105); a statute making it unlawful for freight trains to run on Sunday, no action having been taken by Congress on the subject (*Hennington vs. Georgia*, 163 U. S., 299, 41 L. ed., 166); a statute forbidding the heating of cars by stoves or furnaces (*New York, etc., R. Co. vs. New York*, 165 U. S., 628, 41 L. ed., 853); a statute forbidding a carrier from making a contract limiting its liability for negligence (*Chicago, etc., R. Co. vs. Solan*, 169 U. S., 133, 42 L. ed., 688); and a statute ordaining the character of proof by which a carrier might show its liability was limited to its own line (*Richmond, etc., R. Co. vs. R. A. Patterson Tobacco Co.*, 169 U. S., 311, 42 L. ed., 759), have all been upheld as valid police regulations on the part of the State.

On the other hand, a statute requiring a connecting carrier to trace lost or damaged freight and inform the shipper when, where, and by what carrier the freight was lost, damaged or destroyed (*Central of Georgia R. Co. vs. Murphey*, 196 U. S., 194, (49 L. ed., 444); and a statute requiring a common carrier to furnish cars when demanded under a penalty of twenty-five dollars for each car not furnished (*Houston & Texas Central R. Co. vs. Mayes*, 201 U. S., 321, 50 L. ed., 772), are both held illegal when applied to interstate shipments. Likewise an order of a Railroad Commission requiring cars loaded with coal that are still in the course of interstate transportation to be placed upon certain tracks for delivery, is held in *McNeill vs. Southern R. Co.*, 202 U. S., 543 (50 L. ed., 1142), to be an illegal interference with interstate commerce.

These last cited cases are but in keeping with a long line of other adjudications of this court, for in each of them the subject of regulation was not "local in its nature or sphere of operation," but national in character, and requiring uniformity of regulation. Over such subjects as these the power of Congress is exclusive. Thus in *Leisy vs. Hardin*, 135 U. S., 100 (34 L. ed., 136), it is said:

"Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

So, in *Robbins vs. Shelby Taxing District*, 120 U. S., 489 (30 L. ed., 696), the court says:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, *that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.* This was decided in the case of *Cooley vs. Board of Wardens of Phila.*, 53 U. S., 12 How., 299, 319 (13:996, 1004), and was virtually involved in the case of *Gibbons vs. Ogden*, 22 U. S., 9 Wheat., 1 (6:23), and has been confirmed in many subsequent cases, amongst others, in *Brown vs. Md.*, 25 U. S., 12 Wheat. 419 (6:678); *Passenger Cases*, 48 U. S., 7 How., 283 (12:702); *Crandall vs. Nevada*, 73 U. S., 6 Wall., 35, 42 (18:745, 746); *Ward vs. Md.*, 79 U. S., 12 Wall., 418, 430 (20:449, 452); *State Freight Tax Cases*, 82 U. S., 15 Wall., 232, 279 (21:146, 162); *Henderson vs. Mayor of N. Y.*, 92 U. S., 259, 272 (23:543, 549); *R. R. Co. vs. Husen*, 95 U. S., 465, 469 (24:527, 529); *Mobile vs. Kimball*, 102 U. S., 691, 697 (26:238, 239); *Gloucester Ferry Co. vs. Pa.*, 114 U. S., 196, 203 (29:158, 161); *Wabash, etc., R. Co. vs. Ill.*, 118 U. S., 557 (ante, 244)." (Italics added.)

Further citation of authority would be unnecessary, so well is the principle established.

Therefore, the right to stop trains engaged wholly in interstate commerce already running depends on whether it is a subject over which the States have power to act in the absence

of congressional legislation, or whether it is a subject exclusively within the jurisdiction of Congress, whose non-action is equivalent to a declaration that it shall be free and untrammeled. To which class does it belong?

It would hardly be contended that the requiring of a fast mail and passenger train running from New York to Florida to stop at all stations in South Carolina is "local in its nature or sphere of operation;" yet that is what must be held in order to justify concurrent jurisdiction of the States and Congress on the subject. Fortunately, however, we do not have to rest upon mere argument, as the precise question has been often decided, as we contend, by this court. In the first place, it is beyond question that the stoppage of interstate trains will operate as a serious burden upon the interstate transportation of passengers and mails, for it will lengthen the time of passage to such a degree as practically to render necessary a discontinuance of such trains on account of the resulting loss of traffic. (Statement of case, pars. 5-9.)

But, under the decisions of this court, interstate transportation of passengers is commerce within the meaning of the Constitution. Thus in *Tiernan vs. Rinker,* 102 U. S., 123 (26 L. ed., 104), it is said:

"The portion of commerce with foreign countries or between the States, which consists in the transportation and exchange of commodities, is of national importance, and admits and requires uniformity of regulation."

Again in *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S., 196 (29 L. ed., 162), this court says:

"The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, *and includes the transportation of persons and property* and the navigation of public waters for that purpose as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations vested in Congress, is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions. *The power also embraces within its control all the instrumentalities by which that*

commerce may be carried on and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive." (Italics added.)

To the same effect is *Leisy vs. Hardin,* 135 U. S., 100 (34 L. ed., 133), and many other adjudications of this court, but we deem these sufficient to support the rule. Not only is interstate transportation of passengers commerce, but it is commerce of such a character as to require exclusive control by Congress. Thus in *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S., 196 (29 L. ed., 162), Mr. Justice Field, delivering the opinion of the court, declares the law in these words:

"It needs no argument to show that the commerce with foreign nations and between the States, *which consists in the transportation of persons* and property between them is a subject of national character and requires uniformity of regulation. *Congress alone, therefore, can deal with such transportation;* its non-action is a declaration that it shall remain free from burdens imposed by State legislation. *Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States."* (Italics added.)

Again, in the leading case of *Wabash, etc., R. Co., vs. Illinois,* 118 U. S., 557 (30 L. ed., 249), Mr. Justice Miller, speaking for the court, uses this language:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook vs. Pennsylvania,* 97 U. S., 574 (Bk. 24 L. ed., 1018); *Brown vs. Maryland,* 12 Wheat., 446 (25 U. S. bk,, 6. L. ed., 688). And it would be a very feeble and almost useless provision, but

poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, *or any other restrictive regulation interfering with and seriously embarrassing this commerce.*"

And in *Leisy vs. Hardin,* 135 U. S., 100 (34 L. ed., 133), we find this court saying:

"*The transportation of passengers* or of merchandise *from one State to another is in its nature national, admitting of but one regulating power;* and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the Federal Government." (Italics added.)

In the *State Freight Tax Case,* 15 Wall., 232 (21 L. ed., 163), the same question arose and the court disposed of it in the following language:

"Whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley vs. Port Wardens,* 12 How., 299; *Gilman vs. Philadelphia, supra; Crandall vs. The State of Nevada,* 6 Wall., 42 (73 U. S., XVIII, 746). *Surely transportation of passengers* or merchandise *through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power,* for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed." (Italics added.)

Numerous other cases are to the same effect, but we merely refer in addition to

Welton vs. Missouri, 91 U. S., 275 (23 L. ed., 547).
Hannibal, etc., R. Co. vs. Husen, 95 U. S., 465 (24 L. ed., 527).
Mobile County vs. Kimball, 102 U. S., 691 (26 L. ed., 238).
Webber vs. Virginia, 103 U. S., 344 (26 L. ed., 565).

These authorities conclusively demonstrate that interstate transportation of passengers is a subject over which Congress has exclusive jurisdiction. This being true, can State action be taken when Congress has not seen fit to legislate? If the jurisdiction of Congress is *exclusive,* it would seem that in no case could State action be taken; and such is the law as declared by this court.

Thus in *Welton vs. Missouri,* 91 U. S., 275 (23 L. ed., 350), it is said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

Again in *Brown vs. Houston,* 114 U. S., 622 (29 L. ed., 260), the court says:

"The power of Congress is exclusive whenever the matter is national in its character or admits of one uniform system or *plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States* as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. *So long as Congress does not pass any law to regulate commerce among the several States, it hereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom.* This has frequently been laid down as law in the judgments of this court." (Italics added.)

Quotations to the same effect and expressed in almost identical words could be multiplied almost indefinitely, but it could serve no useful purpose; hence we merely refer to the following cases as laying down the same principle:

Gilman vs. Philadelphia, 3 Wall., 713 (18 L. ed., 96).
Crandal vs. Nevada, 6 Wall., 35 (18 L. ed., 745).
State Freight Tax Case, 15 Wall., 232 (21 L. ed., 146).
Hannibal, etc., R. Co., vs. Husen, 95 U. S., 465 (24 L. ed., 527).
Tiernan vs. Rinker, 102 U. S., 123 (26 L. ed., 103).
Mobile County vs. Kimball, 102 U. S., 691 (26 L. ed., 238).
Webber vs. Virginia, 103 U. S., 344 (26 L. ed., 565).
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196 (29 L. ed., 158).
Walling vs. Michigan, 116 U. S., 446 (29 L. ed., 694).
Pickard vs. Pullman Southern Car Co., 117 U. S., 23 (29 L. ed., 785).
Wabash, etc., R. Co. vs. Illinois, 118 U. S., 557 (30 L. ed., 244).
Robbins vs. Shelby Taxing District, 120 U. S., 489 (30 L. ed., 696).
Bowman vs. Chicago & N. W. R. Co., 125 U. S., 465 (31 L. ed., 700).
Leisy vs. Hardin, 135 U. S., 100 (34 L. ed., 128).
Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204 (38 L. ed., 962).
United States vs. E. C. Knight Co., 156 U. S., 1 (39 L. ed., 325).

After this review of the authorities, our conclusion is that a train running from New York to Florida, and conversely, engaged wholly in the transportation of interstate passengers and the United States mails, is engaged in interstate commerce of such a character as to be within the exclusive jurisdiction of Congress, and that non-action by Congress with reference to it is equivalent to a declaration that it shall be free and untrammeled. This being the law as established by the decisions of this court, we submit that it cannot be said that this interstate transportation of passengers can be interfered with by State legislation designed to have better local facilities furnished its citizens. If it be the law that interstate transportaton is within

the exclusive domain of Congress, it must also be the law that State interference with it is unwarranted and illegal.

It may be said, however, that this would not be true in this case, for the reason that the time of a stop at Latta would be too short and unappreciable to amount to anything. This might be the case if the stops could be confined to Latta, but once admit the right to stop such trains and every station would make similar demands, which would practically destroy the tourist travel of the railroad. In fact, the uncontradicted testimony in this case shows that if these two trains were required to make stops at all places like Latta on their entire route, the time of their run would be increased seven hours (printed Transcript of Record, p. 112); and surely it requires no argument to show this court that this would be an intolerable burden on interstate commerce. Such being the facts, the language of this court in *Cleveland, C. C. & St. L. R. Co. vs. Illinois, supra,* is peculiarly pertinent:

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the Legislature may not compel them to stop at every station, a requirement which would be practically destructive of through travel where there were competing lines unhampered by such regulations. * * * We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it."

In *Mississippi R. R. Commission vs. Illinois Central R. Co., supra,* the court again declared itself in these words:

"The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the Commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The Legislature of a State could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.

"The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small obstacle, ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals."

These declarations of the court are but in keeping with its ruling in *Illinois Central R. Co. vs. Illinois, supra,* to the effect that a "State can do nothing which will directly burden or impede the interstate traffic of the company, *or impair the usefulness of its facilities for such traffic.*" (Italics added.)

They also rest upon the additional ground that the power of stoppage affects the entire journey and, hence, is not within State jurisdiction. Says the court in the leading case of *Hall vs. De Cuir,* 95 U. S., 485 (24 L. ed., 548):

"It may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. *While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.* His disposition of passengers taken up and put

down within the State, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced." (Italics added.)

Wabash, etc., R. Co. vs. Illinois, supra, is practically to the same effect.

This power to affect the entire journey gives the key to the whole situation, and renders it certain that State interference with interstate commerce trains for the purpose of supplying local needs is beyond the authority of State legislation.

So far as the case at bar is concerned, it is also shown that the two trains sought to be stopped are under a contract to carry the United States mails, and that such contract requires them to make their schedules or else make good excuse for the delay. (Statement of Case, *supra,* Paragraph VIII.) Would not this also give rise to Federal rights to be respected by the State? On this point, this court, in *Illinois Central R. Co. vs. Illinois, supra,* uses the following language:

"It may be well, as held by the courts of Illinois, that the arrangements made by the company with the Postoffice Department of the United States, cannot have the effect of abrogating a reasonable police regulation of the State. But *a statute of the State which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation.*" (Italics added.)

Again in the recent case of *Mississippi Railroad Commission vs. Illinois Central R. Co., supra,* it is held that:

"The fact that the company has contracts to transport the mails of the United States *within a time which requires great speed for the trains carrying them,* while not conclusive, may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a State."

Our conclusion, therefore, is that under the decisions of this court, though there may be a few DICTA to the contrary, a State

has no right to require a train engaged wholly in interstate transportation of passengers and carriage of the mails to stop in order to provide better local accommodations not otherwise adequate, but that the limit of State authority is to require more trains within the State. The true rule would seem to be that announced by the Circuit Court of Appeals (as a *dictum*) in *Illinois Central R. Co. vs. Mississippi R. R. Commission*, 138 Fed., 333:

"The State unquestionably has ample power to require the complainant company to furnish adequate facilities and accommodations to the town of Magnolia. The citizens of Magnolia have not asked for such relief as could be granted them without interfering with the rights of others. They ask only to have two trains, Nos. 1 and 3, to stop. These trains were designed and scheduled for through travel and to comply with government contracts to carry the mails from Chicago to New Orleans. If the statutes may be applied to stop through trains at Magnolia, they may be stopped at all stations in Mississippi. To require these trains to stop at all at Magnolia seems unnecessary and unreasonable. If the accommodations afforded are not adequate, why single out the through mail trains and seek to convert them into local trains? Why not, under existing statutes, or statutes to be enacted, exert the police power of the State to improve the service by having better equipments on the three passenger trains now in use from Magnolia, and, if they are insufficient, by requiring other trains? The citizens of Magnolia are entitled to sufficient accommodations, and the State has the power to enforce the right; but when such right can be enforced otherwise, it is unreasonable to do so by interfering with the rights of others equally entitled to the protection of the law."

We submit that if the court will construe the cases of *Cleveland, C. C. & St. L. R. Co. vs. Illinois*, and *Mississippi R. R. Commission vs. Illinois Central R. Co., supra*, in connection with the long line of other cases we have cited in support of our contention, the correctness of that contention will clearly appear. This is precisely what was done in the closely analogous case of *Wabash, St. Louis & Pacific R. Co. vs. Illinois*, 118 U. S., 557 (30 L. ed., 244), and the result was exactly as we here contend for.

Such a rule works no hardship to any one, indeed it is the only one assuring absolute justice to all. The interstate tourist traveler and the mails of the United States can go on untrammeled, while, on the other hand, the State can amply care for

local needs. In case of the necessity for a train beyond State lines, it is clear that Congress is the only power able to afford relief, for no argument is necessary to show that at best a State can only force a railroad to run a train to the boundary line. So we submit that such is the law of this court, and that it is necessary and proper that it should be so.

C. The Question of Providing Adequate Local Facilities not Having Been an Issue in the Original Petition of Latta to the Railroad Commission, and not Having Been Considered by Such Commission, Could the Inadequacy of Local Facilities be Used as an Excuse to Violate the Interstate Commerce Rights of the Railroad Company?

(Assignment 5.)

Examination of the record will show that the citizens of Latta at first asked for *better accommodations,* so that they could get back home at night from the South (Statement of Case, *supra,* Paragraph 13, printed Transcript of Record, p. 22), and *that this was provided by changing the schedule of the Latta Branch train to connect at Pee Dee Junction with the night local passenger from Florence to Wilmington.* (Letter of W. N. Royall, General Superintendent. Statement of Case, *supra,* Paragraph 13, printed Transcript of Record, p. 64). As the Record shows, *this was all they ever asked in the way of better local facilities.* However, they soon afterwards did make a demand that trains Nos. 32 and 35 stop at Latta, *but stated no reason therefor.* (Statement of Case, *supra,* Paragraph 14, printed Transcript of Record, pp. 61, 62.)

The only thing the Commission could do was to consider the character of trains Nos. 32 and 35 in connection with the request to stop them, and, after taking all these things into consideration, advise whether in their opinion it would be proper to stop such trains. The Commission had no authority to make a final order requiring any train to stop at a particular station, for the reason that it could not make any order whose reasonableness would not be open to judicial review, as the exercise of such a power would be a denial to the railroad company of due process of law and the equal protection of the laws guaranteed by the Constitution of the United States. And for the same

reason the Railroad Commission—an administrative board—could not have judicially determined whether facilities at Latta were adequate, even if that question had been before it.

But, even if the Commissioners could have decided the issue as to local facilities at Latta, the fact remains that they did not do so by a trial directed to that end. They merely said that "after personal inspection of the situation at Latta, and the demand of said citizens for these accommodations," it appeared to them that sufficient accommodations were not furnished, and it would not be unreasonable to stop trains Nos. 32 and 35. (Statement of Case, Paragraph 16.)

It will be noted that the Commissioners do not pretend they had a trial at Latta on the question of providing adequate local facilities, but denominate their proceeding a *"personal inspection of the situation."* Now, we most respectfully submit that a mere personal inspection and the demand of certain citizens are not sufficient to determine that a railroad must stop its interstate commerce trains at a certain station. In the running of these interstate trains the railroad company enjoys valuable rights, and these are not to be taken away by any mere personal inspection or demand that they be interfered with. The due process clause of the Fourteenth Amendment to the Constitution of the United States demands and requires a proper trial before a duly constituted court, and, even if the Commission was such a court and could have afforded such a trial, the fact remains that it, according to its own admission, did not do so; and this being true, it necessarily failed legally and judicially to determine that accommodations at Latta were not sufficient. But, under the authorities cited in the first part of this Brief, it is clear that the Railroad Commission is not a court, and, therefore, was without power to afford a trial on the question of adequacy of local facilities.

Since the Commission neither judicially determined nor had authority judicially to determine whether local facilities were already adequate at Latta, manifestly it could not violate the interstate commerce rights of the railroad company. For we take it that, even conceding that it is proper for a State to stop a train engaged wholly in interstate commerce in order to supply adequate local accommodations, *an order requiring such a train to stop cannot be made until it has been judicially determined that sufficient accommodations have not been furnished. C., C. C. & St. Louis R. Co. vs. Illinois*, 177 U. S., 514 (44 L. ed., 868); *Mississippi R. R. Commission vs. Illinois Cen-*

tral R. Co., decided December 3, 1906. The inquiry must be directed to the end of determining judicially whether facilities are adequate and whether certain trains can reasonably be made to provide them in case they are not adequate, and this is a judicial question requiring due process of law for its determination. *Chicago, etc., R. Co. vs. Minnesota*, 134 U. S., 418 (33 L. ed., 970). No judicial determination of the question having been made in this case, the interstate commerce trains of the defendant could not be legally interfered with, even if we concede that it is within the power of a State to require local accommodations, not otherwise adequate, to be supplied by trains engaged wholly in interstate commerce.

But our contention is that the decisions of this court, when properly construed, are to the effect that a State can make no order requiring trains engaged wholly in interstate commerce to stop at stations to serve local needs, whether local accommodations are sufficient or not, and if such be the law, certainly they could not legally be required to stop when it had not been judicially determined whether local accommodations were adequate or not. (*Authorities under Part II, subd. B., supra.*)

D. The Question of the Railroad Company's Providing Adequate Local Facilities not Being Before the Supreme Court of South Carolina, Except by Way of Affirmative Defense, Urged by the Defendant Railroad Company in Its Answer on the Merits, and it Appearing that Said Supreme Court of South Carolina, After Appointing Its Referee to Take the Testimony, Refused to Consider Such Testimony, When a Consideration of Such Testimony Would Have Shown Adequate Local Facilities Were Provided, Could the Failure to Provide Such Facilities be Made the Ground of Stopping Interstate Commerce Trains Nos. 32 and 35 at Latta?

(Assignment 6.)

It should be borne in mind that this case was first heard in the Supreme Court of South Carolina on a demurrer to the complaint, and upon such hearing that court rendered an interlocutory opinion overruling the demurrer with leave to defendant to answer. Prior to the decision on the demurrer, all the proceedings were had before the Railroad Commission, which,

as we saw in the preceding section of our argument, could not consider the question of adequacy of local accommodations at Latta, since no such issue was raised in the petition of the citizens of Latta upon which the railroad company was called to a conference, nor could it have been judicially determined if it had been raised, as the Commission was not a court.

After the court filed its opinion overruling the demurrer, the defendant served its answer in which, after repeating the grounds taken by the demurrer, it alleged, *inter alia,* as an affirmative defense, that sufficient accommodations were already furnished the citizens of Latta, and those residing along the Latta Branch railroad. (Answer, printed Transcript of Record, p. 18). Thus for the first time the question of adequate local facilities became an issue in the case, despite what is said to the contrary in Paragraph 3 of the complaint, or anywhere else in the Record. Since the answer alleged sufficiency of local facilities as a complete defense to the attempt to stop interstate trains Nos. 32 and 35 at Latta, it necessarily became the duty of the court—the case being no longer before the Railroad Commission—to determine whether the facilities were really sufficient. In order that the court might determine this question and the additional question as to whether it would be reasonable to stop these trains under all the circumstances, the Attorney-General of the State appeared before the court and moved that a referee be appointed to take the testimony on all issues involved and report it to the court. The motion was granted, and the referee took and reported the testimony as required. (Statement of Case, Paragraph 20.)

When the matter came on for a hearing, the court refused to consider the testimony as reported by the referee, held the finding of the Commission final, and awarded a writ of mandamus to enforce it. (Statement of Case, Paragraphs 21-23.) From this statement of the proceedings before the court, it is readily seen that the adequacy of facilities at Latta has never been passed upon by any judicial tribunal, although urged by defendant as a defense to the attempted interference with its interstate commerce trains. Not only did the court refuse to determine whether the facilities were adequate, but, in addition, to say whether it would be reasonable under all the circumstances to require trains of the character of Nos. 32 and 35 to stop at such a place as Latta. The Railroad Commission could not do this, because these were judicial questions requiring determination by a duly constituted court, and it could not be

said, with any show of reason, that the Railroad Commission was a court. Since the Commission did not assume, and if it had so assumed, was without power, to pass judicially on these questions; and since the Supreme Court absolutely refused to pass judicially upon them; we contend that the enforcement of the order of the Commission by a writ of mandamus deprives defendant railroad of its property without due process of law, and denies to it the equal protection of the laws. That this conclusion is inevitable we think is demonstrated beyond question by the authorities referred to in Part I of this argument.

If the court had decided that the facilities were inadequate, and that requiring the trains to stop, in view of all the circumstances, would be reasonable, quite different questions would be before this court. But we must treat the case as we find it; and this being true, the questions arise (1), has defendant railroad been deprived of its property without due process of law and been denied the equal protection of the laws? and (2), were the facilities at Latta adequate? The first of these questions we disposed of in the first part of our argument, but the second we shall now discuss. We have endeavored to show that be facilities adequate or inadequate, trains engaged wholly in interstate transportation and carriage of the mails cannot be interfered with; hence we pass that over. But be that as it may, we shall endeavor to show to your Honors, that the testimony the South Carolina Supreme Court refused to consider shows, beyond question, that the facilities at Latta were amply sufficient for all local requirements; and if such be the fact, the writ of mandamus was erroneously issued.

That this court has authority to examine this question is clear from the recent decision in *Mississippi R. Commission vs. Illinois Central R. Co., supra*, where the language of the court is as follows:

"In reviewing statutes of this nature, and also orders made by a State Railroad Commission, it frequently becomes necessary to examine the facts upon which they rest, and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the State or its Commission with the interstate commerce of the railroad. Whether there has or has not been is a question of law arising from the facts."

To the same effect is *A. C. L. R. Co., vs. N. C. Corp. Com.*, Sup. Ct. U. S., April 29, 1907.

This being true, what do we find here? We have already endeavored to show that in their petition the people of Latta did not ask for better local accommodations, but simply *demanded* that trains Nos. 32 and 35 be required to stop at Latta. It should also be borne in mind that the original request of these people for better accommodations from the South at night was duly complied with by the railroad company by changing the schedule of the Latta Branch trains so as to connect at Pee Dee with the local passenger from Florence to Wilmington. (Printed Transcript of Record, pp. 21-22, 64); and even after this crusade was begun to stop trains 32 and 35, the railroad offered to make further changes in the local schedules if better accommodations were what the Latta people were seeking. (Printed Transcript of Record, p. 68.) But, so determined were they to have these two trains stopped, that they completely ignored this suggestion. This would seem to prove conclusively that it was not a desire for better local accommodations, but rather for the privilege of enjoying all the advantages of their rival, Dillon, that prompted these people to act as they did. But, be that as it may, the answer raised the issues of sufficient local accommodations and the peculiar character of these two trains as carriers of interstate travelers and the United States mails; and upon both of these issues the referee took testimony only to have the South Carolina Supreme Court refuse to consider it. We contend that a consideration of this testimony would have shown (1), that accommodations at Latta were adequate, and, (2), that it would be unreasonable to require such trains as these to make the stops.

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1. As to Adequacy of Accommodations.

The testimony of Mr. W. J. Craig, defendant's General Passenger Agent, is so full on this subject that we take the liberty of quoting from it at length: (Printed Transcript of Record, pp. 98-101, 103-104.)

"Q. Mr. Craig, do you know the passenger accommodations that are afforded the people at Clio and Latta, S. C.?

A. Yes, sir.

Q. I would be glad, Mr. Craig, if you would locate yourself mentally at Clio, S. C., in the early morning, and trace the train service from that point during the day. That is to say, I wish you would take it up this way: I wish you would take the

first passenger train out of Clio, S. C., and follow that train during the entire day, giving the arrival and departure of that train from any point and show the connections that can be made by that train at every point where it stops to take on and put off passengers?

A. I have prepared here, for my special reference, a crude map of the schedule from Clio to all points served by the Atlantic Coast Line, and I have drawn in red the train service showing the A. M. departures from Clio, and in blue the P. M. departures from Clio. Leaving Clio at 7:00 A. M., arrive at Latta 7:45 A. M. (I am following the red line now), arrive at Dillon 8:05 A. M., arrive at Pee Dee 8:55 A. M., arrive at Florence 9:35, arrive at Charleston 1:20 P. M., arrive at Savannah 6:45 P. M.; leaving Savannah 6:55 P. M., arrive at Waycross 10:00 P. M., arrive at Montgomery at 8:05 A. M., serving intermediate points. At Montgomery prompt connection is made in the Union Depot for New Orleans, Pensacola, Mobile, and Texas points, and also for points on the Mobile and Ohio Railroad, and the L. & N. north of Montgomery. I have given the arrival at Waycross at 10:00 P. M., leaving Waycross at 10:00 P. M., arrive at Tifton at 11:45 A. M., where through service is available to Atlanta and the West. The train arrives at Albany, Ga., at 2:15 A. M.

Leaving Pee Dee at 10:22 A. M., connection is made at Chadbourn for Conway, arriving there at 1:50 P. M. Continuing, arrive at Wilmington at 1:20 P. M., connection being made at this point for Newbern and intermediate points. I have quoted the arrival at Florence at 9:35 A. M., leaving Florence 9:45 A. M., arrive at Darlington 10:35 A. M., at Hartsville 1:45 P. M., arrive at Cheraw 11:29 A. M., Wadesboro 12:30 noon.

Leaving Latta at 10:30 A. M., arrive at Fayetteville 12:25 noon, where connection is made for Sanford and points on the Southern Railway and through Greensboro and beyond; also for points between Fayetteville and Wilmington. Continuing, this train arrives at Richmond 7:45 P. M., Washington 11:40 P. M., Baltimore 1:43 A. M., Philadelphia 4:25 A. M., New York 7:15 A. M.

Leaving Darlington at 10:30 A. M., arrive at Bennettsville 12:45 noon, and going on, arrive at Fayetteville at 7:15.

Q. Mr. Craig, I would like for you to give the connections made in the same way at various points by the train leaving Clio in the afternoon?

A. Leaving Clio at 4:30 P. M., arrive at Latta 6:05 P. M., arrive Pee Dee 8:05 P. M., arrive Florence 7:55 P. M., arrive Sumter 9:30 P. M., arrive at Columbia 10:55 P. M.

Leaving Florence at 8:15 P. M., arrive at Darlington 8:45,

Bennettsville 9:40 P. M., Gibson 10:30 P. M., arrive at Hartsville 9:30 P. M.

Leaving Pee Dee at 8:37 P. M., arrive at Wilmington 11:45 P. M.; leaving Florence at 8:25 P. M., arrive at Charleston at 11:40 P. M., Savannah 2:40 A. M., Waycross 6:05 A. M., Jacksonville at 8:40, serving intermediate points, arriving at Port Tampa 7:25 P. M., arrive at St. Petersburg, Fla., serving intermediate points, at 9:35 P. M., arrive at Miami, Fla., serving intermediate points, at 7:20 P. M. Connection is also afforded from Union Station at Jacksonville for all points on the Seaboard Air Line in the State of Florida. Continuing the service from Waycross at 6:35 A. M., arrive at Montgomery 6:15 P. M., serving intermediate points. At Montgomery the same connections are afforded at Union Depot for New Orleans, Texas, Mobile, and points on the L. & N. Railroad north and south of Montgomery on the Mobile and Ohio Railroad.

Parties from Clio and Latta can also avail themselves by train No. 32 for Fayetteville, Wilson, Rocky Mount, Richmond, Washington, Baltimore, Philadelphia, and New York, by taking the schedule shown at Florence and boarding train No. 32 at Florence; train No. 32 leaves Florence at 8:00 P. M., arrives at Richmond at 4:07 A. M., Washington 7:54 A. M., Baltimore 9:09 A. M., West Philadelphia 11:22 A. M., New York at 2:00 P. M.

Q. Is it not a fact that in addition to the connections you have described on the afternoon, leaving Clio and going to Florence, S. C., that after the arrival of train No. 35 at Florence, connection can be made for all points South and West via Charleston, Savannah, and Augusta, leaving Florence at about 4:00 o'clock A. M.?

A. Yes, sir.

Q. Is it not a fact, Mr. Craig, that the only one connection that is not made either in the morning or afternoon by the train you have described is the train which leaves Florence at 8:00 for Columbia, S. C.?

A. That train only runs to Sumter, but it affords connection at Sumter.

Q. Is or not that the only train that the two trains you have described do not make connection with?

A. Yes, sir.

Q. What additional expenses are passengers going North put to if on leaving Latta they prefer going North on No. 32 rather than by No. 40?

A. Leaving Clio or Latta in the afternoon, connection is afforded at Florence with train No. 32. The additional cost would be $1.42 above what the rate from Latta to New York

would be; in other words, parties can go from Latta to Florence and board train No. 32 at an additional cost of only $1.42 above the price of a ticket from Latta to New York. The following connections are afforded to Clio taking the noon arrival, leaving New York at 9:25 A. M., Philadelphia 11:55 A. M., Baltimore 2:12 P. M., Washington 3:25 P. M., Richmond 7:25 P. M., arrive at Dillon 3:05 A. M.

Parties can leave here, arriving at Latta at 11:15 A. M., Clio 12:45 noon; leaving Wilmington at 6:00 A. M., arrive at Pee Dee 9:05 A. M., arrive at Latta at 10:30 A. M., and Clio at 12:45 noon.

Leaving Port Tampa at 8:25 A. M., Jacksonville at 8:05 P. M., Waycross at 10:10 P. M., Savannah at 1:35 A. M., Charleston at 6:15 A. M., Lanes 8:05 A. M., Florence 9:45 A. M., and arrive at Latta 12:45 noon.

Connection is made at Jacksonville with the above train from Fort Meyers, Fla., St. Petersburg, Fla., and from all points on the Seaboard Air Line in that State.

Leaving Brunswick at 4:10, connection is also made with this through train at Waycross. Leaving Albany at 2:00 P. M., connection is also afforded at Waycross with this through train.

Leaving Montgomery at 6:50 A. M., where connection is made from all points in Texas, Louisiana, Mobile, and Pensacola and points to the east and west thereof, arrive at Waycross at 6:05 P. M., connecting with this through train 40, arrive at Clio at 12:45 M. Leaving Columbia at 6:45 A. M., Sumter at 8:10, arriving at Clio 12:45. Leaving Gibson at 6:00 A. M., Bennettsville at 7:05 A. M., Hartsville at 7:05 A. M., Darlington 7:50 A .M., you reach Clio at 12:45 M.

For the P. M. arrival at Clio 10:05 P. M., the following connections are reported: Leaving Port Tampa, Fla., at 7:25 P. M., Fort Meyers 2:45 P. M., you reach Jacksonville at 7:55 A. M. Leaving Jacksonville at 8:50 A. M., Brunswick at 6:10 A. M., Savannah at 1:05 P. M., Charleston at 5:20, you arrive at Florence at 7:50 P. M., connecting for Clio at 10:05 P. M.

Leaving Columbia at 4:55 P. M., where connection is made with through train from Greenville, S. C., and intermediate points, and with all points on the Southern Railway north of Columbia, you reach Clio at 10:05 P. M.

Leaving Augusta at 2:25 P. M., where connection is made with through train via Atlanta from all points West, you reach Clio at 10:05 P. M., serving intermediate points like Denmark, Orangeburg, Sumter, etc.

Leaving Newbern, N. C., at 9:10 A. M., Wilmington at 3:45 P. M., where connection is afforded to all points north of Wilmington, you arrive at Clio at 10:05 P. M.

Leaving Conway at 2:50 P. M., you reach Clio at 10:05 P. M.; leaving Wadesboro at 4:10 P. M., Cheraw at 5:10 P. M., Darlington 6:24 P. M., Hartsville 4:15 P. M., arrival is made at Clio at 10:05 P. M.

Leaving New York at 9:25 P. M., Philadelphia 12:15 at night, Baltimore 2:37 A. M., Washington 4:30 A. M., Richmond at 9:05 A. M., and intermediate points, arrive at Clio at 10:05 P. M.

Leaving Albany, Ga., at 2:15 A. M., connection is afforded with train No. 32, which would provide for arrival at Clio at 10:00 P. M. It is impossible for me to give all the connections that are afforded by these trains at intermediate points. For instance, at Richmond, with diverging lines at Columbia and Savannah and Charleston, and the same may be said at other junction points where connections are afforded.

Q. Mr. Craig, is your general testimony on this subject of connection shown on these two maps you have prepared?

A. Yes, sir; there has been just one mistake, which you pointed out to me that I have not shown, and that is that Bennettsville connection, which I could put in, and that Conway connection, which I have overlooked.

Defendant introduces maps, which are marked Exhibits "A" and "B."

Q. In describing these connections that are afforded to Clio, S. C., are not all the connections you have described also afforded Latta, S. C.?

A. Yes, sir.

Q. Do you know the last census population of Latta, S. C.?

A. Yes, sir; I have it taken from the United States census, a copy of which I have. *The population, according to the census of 1900 was 453.*

Q. What was the population of Clio?

A. 508.

Q. What is the population of intermediate points between Clio and Latta?

A. The only point shown is Dunbar, 115 people, the United States census report showing that the other points are less than 50 population, and are, therefore, not given.

Q. What is the census population of Kingstree, S. C.?

A. 700 people.

Q. How many passenger trains a day in all directions afford to the people of Latta, S. C., an opportunity of going off by boarding a train?

A. *Eleven.*

Q. The following trains arrive at Latta from Clio: At 7 A. M., 6:05, from all points South, 10:30 A. M., from Dillon 7:50 A. M., Pee Dee and points beyond 9:35 A. M., and 9:05 P. M.

The following trains depart from Latta: For Clio 11:15 A. M., and 9:18 P. M., 7:01 P. M., for Wilmington and Points South and West; 8:30 A. M., Pee Dee and points beyond, 7:40 P. M., for Pee Dee and points beyond. In addition to which there are two local freight trains provided with passenger service, leaving Latta at 9:00 A. M., for Fayetteville and intermediate points, and at 7:01 P. M., for Florence and intermediate points.

Q. What is the census population of Marion, S. C.?

A. In 1900, 1,831.

Q. Isn't it a fact that the only accommodation afforded at Marion, S. C., is a local passenger train each way twice a day?

A. There is only a double daily service at Marion.

Q. Mr. Craig, from the standpoint of an expert in your line, what would you say after the passenger accommodations afforded at Latta, S. C., as compared with other smaller points?

Objected to; first, because it has not been shown that Mr. Craig is an expert; second, that it is not a matter of expert testimony, and the witness should be confined to a statement of facts leaving the matter of the efficiency of the service to be determined by the court.

Q. What road are you General Passenger Agent of?

A. The Atlantic Coast Line Railroad.

Q. What experience did you have in that department of railroad work before you came to the Atlantic Coast Line?

A. I have been in the general freight and passenger office for about twenty-one (21) years.

Q. How long have you been with the Atlantic Coast Line?

A. I have been here in this position for over three years.

Q. Now please go on and answer that question that I asked you?

A. I think the service at Latta is ample to meet all the conditions of travel.

Q. As compared with other smaller points?

A. I think it enjoys superior transportation facilities over similarly located points.

Q. As compared with Marion, S. C.?

A. Is has better passenger accommodations.

Q. As compared with Kingstree, S. C.?

Plaintiff's counsel objects to this line of examination, on the ground that it calls for the opinion of the witness.

A. It has better passenger conditions. It has more frequent train service than Kingstree.

Q. Isn't it a fact that that would hardly apply over the entire system?

A. That is a hard question to answer.

Q. Considering the passenger accommodations at Latta, S. C., isn't it a fact that the passenger facilities at Latta are better

than at points similarly located of the same size and even larger points?

A. It has undoubtedly. I have before me here a statement prepared of all the branch service on our system, and from that statement the service is undoubtedly as good as the best, and better than a large majority of them."

This testimony is undisputed, so it must be taken as true. In the first place, therefore, it clearly appears that, according to the census, Latta and Clio, taken together, have less than one thousand inhabitants, and that only one small station is mention on the entire Latta Branch Railroad. This shows that the great density of population of these communities exists only in the vivid imaginations of the parties dwelling there. Keeping this fact in mind, what does the undisputed testimony show as to the facilities furnished? It appears that eleven passenger trains, besides two freight trains a day, afford the people of Latta an opportunity to travel where they please. At 10:30 A. M., train No. 40, a through express train from Florida to New York, equipped with full complement of day coaches and Pullman sleepers, arrives at Latta and affords the citizens of Latta and Clio ample opportunity to come from and go to all points served by the Atlantic Coast Line Railroad in the South and West and the North and the East. (See Statement of Case, Paragraphs 10 and 12.) At 7:01 P. M., train No. 39, which is the same train going South as No. 40 going North, arrives at Latta and affords similar advantages as No. 40, to all parties coming from the North and East and those desiring to go to the South and West. (Statement of Case, Paragraphs 10 and 12.) These trains were designed primarily to accommodate any interstate travel that there might be from places of the size and importance of Latta, and the testimony abundantly shows that they are amply sufficient for this purpose. It requires no argument to show this court that citizens of an agricultural community like Latta, as a general rule, do very little interstate traveling; and, therefore, two such trains abundantly supply their needs. Of course, there is an occasional traveler from Latta and Clio to New York and the North, but these could more than be accommodated by train No. 40; and the same might be said of the occasional traveler to Florida and train No. 39. If these few interstate travelers—and we submit they must be few from so sparsely settled a country devoted exclusively to agriculture —can be amply taken care of by two trains run expressly for

this purpose, then it would be unreasonable to ask the railroad company to convert its through trains into locals to supply a need that did not exist. Besides, if the few interstate travelers from Latta and Clio must have a trip on trains 32 and 35, they can either drive from Latta to Dillon, which is but a few miles distant, or else go to Florence at trifling expense, where connection can be made with these trains.

The testimony further shows that the people of Clio and Latta are afforded daily, and, in most cases, double daily, connections to all points both within and without the State of South Carolina. Thus to Charleston and points beyond there is a double daily service, and the same is true of Wilmington. In fact, the only possible advantage that could be afforded by stopping train No. 32 would be to allow an occasional traveler bound for the North to board it at Latta, for the reason that all local needs are already amply supplied by a train from the South at night. If, however, train 32 were ordered to make this stop, other stations would immediately demand such a privilege, with the result that it would be converted into a local, thus seriously impairing its interstate business in order to suit the whims of a community already supplied with all the conveniences its patronage warranted. So far as stopping No. 35 is concerned, it appears from the testimony that by getting up at 3 o'clock in the morning a passenger from Latta would be able to get to Columbia by midday, provided he underwent a wait at both Florence and Sumter; whereas he could have left Latta the evening before and gone through to Columbia without change.

So far as Clio is concerned, it appears that that town enjoys the unusual advantage of a double daily passenger service on a branch line of railroad with connections at Latta for all points. And such a service is afforded this little town, even though its operation brings an actual loss to the railroad company. (Printed Transcript of Record, p. 117.) Surely a community of no more importance could not require a further loss merely to suit the whims and fancies of some of its citizens?

Not only has Latta eleven passenger trains a day, affording connection to all parts of the country, but, in being so provided, it enjoys privileges far above those of neighboring towns of much more importance. For example, it is shown in testimony that Marion, the county seat of the county in which Latta is situated, and a town of vastly more consequence, has only four local passenger trains a day, and the same is true of Kingstree,

the county seat of the adjoining County of Williamsburg. In addition to this, the uncontradicted testimony of General Superintendent of Transportation Borden *was to the effect that, taking the travel of the past ten years as a basis, the facilities furnished at Latta were amply sufficient to take care of all the local travel from that point.* (Printed Transcript of Record, p. 113.) If this be true—and it must be so held, as it is nowhere disputed—it requires no argument to show to this court the loss and hardship the railroad company would be subjected to by making its fast trains into locals; and, therefore, the order was improper.

So far we have referred exclusively to the testimony of defendant's witnesses, but that offered by plaintiff strengthens rather than weakens our conclusions. The burden of the testimony of the witnesses, J. J. Bethea, Thacker, Smith, R. J. Dew, Sellers, J. S. Bethea, and J. S. Dew, is that they are not furnished the great privilege and convenience of getting up shortly after midnight to take train No. 35 at Latta, spending the remainder of the night in a waiting room at Sumter, and at 9:30 A. M. that day go on to Columbia, where they may make connection with the Southern Railroad for the up-country. By leaving Latta at 7:01 o'clock in the evening they would have the advantage of a continuous trip to Columbia, where the same connections would be made with the Southern next day as on the morning trip. They all complain that they would have to pay a hotel bill in Columbia if they went at night, because of lack of connections, but the Atlantic Coast Line Railroad Company is not responsible for this, as it does its full duty by taking all passengers offered to the terminus of its line in Columbia, where the Southern fails to make the connections desired by these travelers from Latta and Clio. Several other witnesses complain about the failure to make connections at Sandford, N. C., entirely overlooking the fact that the fault lies with the Southern Railroad again; and Mr. Henry does not like it because he cannot go to Weldon or Rocky Mount and make connection for Norfolk, though he admits that he can make closer connection at both of these places by taking No. 40 at Latta at 10:30 A. M.

From an inspection of plaintiff's testimony taken at Latta, it will be observed that there was not even an attempt to prove the allegation of the complaint that inadequate conveniences were furnished the people of Latta. Taking the testimony of Mr. J. J. Bethea, plaintiff's principal witness—and no other witness

denies his testimony—we ascertain that early in the morning of each day a train leaves Clio, S. C., and goes to Latta, from Latta goes to Dillon, from Dillon it returns to Latta, and from Latta goes to Pee Dee, S. C., a junctional point on Atlantic Coast Line Railroad, arriving at Pee Dee in the morning. At Latta passengers from Clio and Latta are furnished a connection on a through train for all the points North, with through sleeping cars to New York. At Pee Dee passengers from both Clio and Latta make connection with trains for every point served by the Atlantic Coast Line Railroad Company, except that passengers cannot by that train have a continuous schedule to Columbia, S. C. This train at Pee Dee receiving passengers from all points served by the Atlantic Coast Line, returns to Latta in the morning, continuing its course to Clio. Returning from Clio in the afternoon, it makes its second trip to Latta and goes to Pee Dee, making at that point connection with trains going to all points served by the Atlantic Coast Line. Returning, this train, receiving passengers from all points, goes to Latta and Clio. Clio is located at the end of a branch road and has the unusual advantage of a double daily service and connection with the main line at Latta. Latta in turn, being at the junctional point, gets the benefit of this service, and, in addition, has a freight train serving the passenger traffic running North and South once a day. In addition to this provision, for local travel, Latta, being located on the main line, is given the advantage of a daily service North and South of a through train between all points in Florida and New York, and the local train described, in constantly leaving and returning to Clio through Latta, makes connection with these trains. If the schedules of trains at such places as Marion, Kingstree, Lake City, and other places located on the Atlantic Coast Line Railroad, much larger and more important than Latta, are considered, it will be ascertained that so far as Latta is concerned, by comparison with the other places mentioned, it is a most favored point. This is not a mere assertion, but is a fact easily recognized by a most casual inspection of the testimony of the plaintiffs. While this admitted testimony of the plaintiffs shows that the conveniences furnished to the people of Latta and Clio are not only entirely adequate, but altogether unusual even for such points so fortunately located, we will find that there was no other testimony given by the witnesses at Latta, S. C., at all applicable to the issues involved, relating as it does to the equipment of the ticket offices at Latta and Clio and the

equipment of the service, as to character of the cars, such as furnishing a tin cup for drinking water, and unclean cars, inasmuch as such things, ifproved, could have no bearing upon the question of stopping interstate commerce trains, because such testimony, giving rise to these collateral questions, could only be considered by the Railroad Commission on petitions or complaints looking to their correction as specific evils wholly unconnected with the question of stopping the interstate commerce trains at Latta. In the testimony of the witnesses taken at Latta, some of the witnesses have suggested the advisability of the Atlantic Coast Line Railroad Company running its trains to Columbia so that connection will be immediately made, without any lay-over at Columbia, for points served by the Southern Railway out of Columbia. It might, with propriety, be suggested that when the Atlantic Coast Line Railroad Company gives a through connection from Latta to Columbia—which is as far as its road goes in that direction—its duty there ends; and it might further, with propriety, be suggested that the question of starting out a train from Latta to connect with the Southern Railway, simply to furnish the people of Latta this convenience, should be referred to some other case, in which the corresponding duty of the Southern Railway should be called into question. Clearly such testimony does not enlighten the present contention that the Atlantic Coast Line Railroad Company should stop its trains 32 and 35 at Latta. It cannot be contended that these last-mentioned trains should be stopped at Latta simply to give to the people residing there the privilege of starting for Columbia at 3 o'clock in the morning and spending a part of the night at Sumter, which they would be compelled to do, when it is a fact that the people of Latta can leave Latta for Columbia in the afternoon and have the convenience of a through trip to Columbia.

The entire result of the testimony is that the people of Latta, in considering the passenger service that the Atlantic Coast Line gives in furnishing them a double daily connection with all points North and South, they have discovered that the Southern Railway does not make connection with the Coast Line at Columbia, and that this should be corrected by giving them the privilege of starting for Columbia at 3 o'clock in the morning and spending a part of the night in Sumter, at which point neither the Southern Railway nor Coast Line furnishes them with a continuous unbroken trip to the up-country.

On the day following the taking of testimony at Latta, the plaintiffs continued the taking of their testimony at Clio, and the testimony of the following witnesses residing at Clio was taken: J. C. Covington, H. J. Bennett, C. S. Evans, A. L. Calhoun, J. Strauss, and S. Weill. The testimony of these witnesses was all of the same character. They recognized the agreeable fact that this town of Clio, located at the end of a branch line nineteen miles distant from Latta, was given a double daily passenger service to Latta and Pee Dee, where, joining with the main line, connection was afforded twice a day for all points served by the Atlantic Coast Line. It was admitted by these witnesses that when passengers from Clio desired to go North, connection was made daily at Latta with the morning train from Clio for all points North, and with the evening train for all points South. Failing entirely to furnish any proof as to inadequate accommodations by way of passenger service, they confined their testimony to immaterial points, such as a general criticism of the character of the passenger cars; which, if proved, is wholly immaterial to the present issue, and a subject the consideration of which should have been reserved for some other contention. In other words, such a want of accommodation, if it exists, could not be cured by stopping the interstate commerce trains at Latta, for it cannot be conceived that this result would improve the character of the passenger cars used between Clio and Latta. The distinguishing feature of the affirmative evidence given by the Clio witnesses was their very frank admission of the selfish character of their desire, if any such desire was expressed by them, that trains Nos. 32 and 35 should stop at Latta. These witnesses very frankly stated that the daily trains which served their purpose in making through connection North and South were first-class trains, provided with sleeping cars, and their only objection to these trains was that when they boarded them at Latta and started North or South, the railroad company was considerate enough to stop these trains at other points like Latta to afford the public like accommodations; in other words, they desired fast trains. They admitted the fact that if trains Nos. 32 and 35 stopped at Latta and similar points they would become just such trains as the two other trains in question. They further admitted that it was entirely unnecessary to have two such trains each way a day—that is, local trains, made such by stopping trains Nos. 32 and 35 at Latta and similar points—and undertook to solve the question by stating that it was their

desire that trains Nos. 32 and 35 should stop at Latta and should then stop at no other point. In other words, they expressed the desire that the Atlantic Coast Line Railroad Company should furnish the people of Clio and Latta every convenience for through and local travel, and, in addition, should stop its interstate commerce trains at Latta, but at no other point, so as to make the rights of the people at every other point less than and subservient to the convenience, desires, and demands of the people of Latta and Clio. The very frank expression of these witnesses at Clio certainly justifies the criticism that they are asking, not only for their own protection, but that the rights of others should receive a secondary consideration.

Such being the facts of the case, we submit that the facilities afforded at Latta were all the travel from that community would warrant.

In *C., C., C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514 (44 L. ed., 868), eight local passenger trains a day were admitted by the demurrer to afford sufficient local accommodations; and in the recent case of *Mississippi R. Commission vs. Illinois Central R. Company*, where there was an attempt to stop two southbound interstate passenger and mail trains of the Illinois Central R. R. Co., the railroad company furnished three local southbound trains a day, and this court affirmed the holding of the Circuit Court of Appeals that the facilities were already adequate. That case is closely analogous to this for the reason that, just as here, it did not appear from the evidence that the trains that stopped at Magnolia going South were not sufficient for the travel, but the objection or complaint shown by the proof was that the trains were not well equipped, and that they left at inconvenient times. (See 138 Fed. Rep., 331.) So that we take it that the facts of the case at bar make it much stronger than the two just cited, and, if the accommodations were sufficient there, they must be here.

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2. As to the Character of Trains Nos. 32 and 35.

Not only did the defendant railroad prove that the facilities afforded were adequate, but, in addition, showed that trains Nos. 32 and 35 were of such a character that it would be unreasonable to convert them into locals. In Paragraphs 5 to 9, inclusive, of the Statement of the Case, *supra*, we have made a concise

statement of the character and operation of these trains, to which we refer your Honors rather than repeat it here. In addition to this statement, we may say that the undisputed testimony of defendant's witnesses showed that these trains, constituted as they were, were not adapted for local work; that they would lose their through patronage if made locals; that they would be run at a dead loss as locals, for the reason that there was not sufficient local patronage to require them, and the through patronage would be gone; that being made locals they would be operated at a loss, which would require their abandonment, and that if made locals the United States Government would take away the through mail contract and give it to a line not so hampered. The plaintiffs did not controvert this testimony, so it must be taken as true.

So that in the case at bar we have conclusive proof that the facilities were adequate, and additional proof that it would be most unreasonable to convert these trains into locals. Such being the facts, we earnestly submit that it was error to award a writ of mandamus to compel the defendant to stop these two trains at Latta; and the more especially in view of the further fact that the Supreme Court of South Carolina refused to pass judicially on the facts of the case and awarded its writ without deciding anything whatever as to the real merits of the controversy.

E. Is it Only After All Local Conditions Have Been Met That Railroads Doing an Interstate Commerce Business Have the Right to Adopt Special Provisions for Through Traffic?

(Assignment 10.)

It is contended, however, that through lines of railroad running across many States have no right to adopt special provisions for through traffic until they have adequately provided for all local needs. It is true, in *Cleveland, C., C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514 (44 L. ed., 872), this court said "that, after all local conditions have been adequately met, railways have the right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable," but this statement must be considered with reference to the peculiar facts of that case. As we have before shown, in that case the

demurrer admitted that local facilities were adequate, hence this statement of the court was merely to the effect that such being the fact, there was no necessity to interfere with through trains. The court did not say, and we submit did not intend to say, that a railroad company having a line extending through several States has no right to provide for the interstate traffic among such States until it has furnished all the local trains each of these several States may desire. Neither do we see that such a doctrine has been laid down in *Lake Shore & M. S. R. Co. vs. Ohio,* 173 U. S., 285 (43 L. ed., 702); for that case referred solely to the right of a State to require local trains to be run.

If it is the primary duty of the railroad company to provide for local accommodations, and if it is the secondary duty of the railroad company to provide for the needs of interstate traffic, it cannot be contended but that these two duties, denominated primary and secondary, are of equal importance in the one case to the local traveling public, and in the other case, to the interstate traveling public; and that it is equally the duty of the railroad company to provide for both, even though one be termed primary and the other secondary. Indeed, If such a doctrine were carried to its legitimate conclusion, it would necessarily result in holding that Congress is absolutely powerless to require a railroad extending across several States to run a train for the interstate transportation of passengers until each State deemed it had sufficient accommodations, although under the long line of decisions of this court, such transportation is a subject of interstate commerce of national character, and consequently within the exclusive jurisdiction of Congress. The doctrine here contended for by the defendant in error shows the limit to which a State will go in the attempt to regulate interstate commerce, and we submit that it affords another argument in support of our contention that the law of this court is—or should be—that the local accommodations, when shown to be inadequate, must be provided by local trains run under State authority, and not by interference with through trains engaged wholly in the interstate transportation of passengers.

In the case at bar, the Atlantic Coast Line Railroad Company is *a corporation created by the laws of the State of Virginia* (Answer, printed Transcript of Record, p. 18), and as such operates a continuous line of railroad from Port Tampa, Fla., to Richmond, Va. Now the contention here is that this through line of railroad cannot operate a through train between its ter-

mini until it has first provided adequately for the State of South Carolina. We submit that this road is equally tributary to Virginia, North Carolina, South Carolina, Georgia, and Florida; and, therefore, that South Carolina has no authority to interfere with the rights of Virginia and Florida, North Carolina and Georgia. A through passenger from Richmond to Port Tampa has just as much right to demand an uninterrupted journey as the local traveler from Latta to ask that he be allowed to go to Columbia at 3 o'clock in the morning rather than take the ample provision afforded him at 7 o'clock in the evening. We submit, therefore, that even applying the rule that railroads must primarily provide adequate accommodations for those to whom they are directly tributary, so far as the Atlantic Coast Line is concerned, this duty would require it to provide these facilities to Virginia, North Carolina, Georgia, and Florida; and that while South Carolina could compel local conditions to be met, it could not do so by infringing the rights of the other States concerned. The authorities submitted above on the power of a State to interfere with trains engaged wholly in the transportation of interstate passengers, in our view, render further comment on this subject unnecessary.

F. Could the Writ of Mandamus be Framed so as to Require Trains Nos. 32 and 35 to Stop at Latta, With the Alternative Provision That the Duty to Provide Adequate Facilities Might be Discharged by Furnishing Facilities Substantially the Same as Those That Would be Furnished by Stopping Trains Nos. 32 and 35, When This Alternative Requirement was Undefined, Unwarranted and Based Upon a Question not Decided by the Court?

(Assignment 11.)

At the close of its second opinion the South Carolina Supreme Court used this language:

"The court has reached the conclusion that the writ of mandamus should be issued; but in order that the respondent may have the opportunity of discharging its primary duty in the premises without stopping trains Nos. 32 and 35 on flag, *the writ will be so framed as to confer upon the railroad company*

the alternative right to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag." (Italics added.)

By inserting this alternative provision, the court endeavored to avoid interfering with interstate commerce trains; but, in our view, this alternative provision is totally ineffective to accomplish any such result.

We may ask what facilities would be substantially the same? To suit all parties, they must be defined. They cannot be defined in this case, because the issue has never been before the court, and has never been defined by the Railroad Commission. The only way in which the question has ever been raised is by way of affirmative defense, and the South Carolina court has not considered this defense. It will be recalled that the sole question before the Railroad Commission at the hearing at Latta was as to stopping trains Nos. 32 and 35, and not as to furnishing local facilities. The answer raised the question of adequacy of local facilities, as an affirmative defense, and on this the referee took testimony, which the court refused to consider. So that *whether Latta had sufficient facilities was never passed upon,* and we submit that *this was absolutely necessary in order to give any validity whatever to this alternative provision of the writ.* To require a given locality to be supplied with accommodations in the first instance is a legislative function, but to pass finally upon the adequacy of facilities already furnished and the reasonableness of requiring others rests with the judicial branch of the government. The effect of the order of the Commission, as construed by the court, was not to legislate that better accommodations should be furnished at Latta, but to pass judicially upon the reasonableness of stopping trains Nos. 32 and 35 at that place; and in so doing, as we have shown, it transcended its authority, and its action is illegal as depriving the railroad company of its property without due process of law. When the questions of adequacy of local accommodations already furnished, and the reasonableness of requiring others came before the court, it refused to render judicial judgment thereon, and this again denied to the railroad company due process of law. Since the judicial questions of adequacy of facilities already furnished and the reasonableness of requiring others have never been determined, manifestly to give any force whatever to the alternative provision of the writ, would be depriving the railroad of its property without due process of law, and denying to it the equal protection of the laws guaranteed

by the Constitution of the United States. *Authorities under Part I, supra.*

But there is another reason equally strong for holding this alternative provision of the writ to be beyond the power of the court to make. Whether the facilities being furnished at Latta were adequate, and whether it would be reasonable to provide others by stopping trains Nos. 32 and 35, were judicial questions and could be finally determined by a court alone. On the other hand, requiring facilities to be furnished at Latta and prescribing what they should be, were legislative functions, and, therefore, beyond the pale of judicial authority. The Legislature of the State or some of its duly authorized agencies alone could pass upon such questions. Here the court, without deciding from the testimony whether facilities were adequate, but taking as final and conclusive the order of the Commission, which was without power to make such an order, and which, as a matter of fact, could not pass upon the adequacy of facilities in the proceedings before it as an original proposition by this alternative provision of the writ, orders the defendant railroad company "to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag." (Second opinion of court, printed Transcript of Record, p. 125; writ of mandamus, printed Transcript of Record, p. 140.) We submit that this order to furnish facilities substantially the same as would be afforded by stopping trains Nos. 32 and 35 is a legislative and not a judicial command, and being such, is void under the decisions of this court.

The decision in the *Express Cases*, 117 U. S., 1 (29 L. ed., 803), is directly applicable. There the court, "having found that the railroad company should furnish the express company with facilities for business, had to define what those facilities must be; and *it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business in its line.*" (Italics added.) Such requirement was held by this court to be void, on the ground that the order was legislative and not judicial, and, therefore, beyond the power of the court to make. We take it that the court had no more authority to require facilities substantially the same as those which would be furnished by stopping trains Nos. 32 and 35 than it would have to order a certain tariff of rates fixed by it to be adopted; and that the latter

could not be done is conclusively established by the decisions of this court. Without quotation, we refer to the following authorities as settling the principle:

Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362 (38 L. ed., 1014).
St. Louis & S. F. R. Co. vs. Gill, 156 U. S., 649 (29 L. ed., 572).
Interstate Com. Commission vs. Cincinnati, etc., R. Co., 167 U. S., 479, 500 (42 L. ed., 253).
Chicago, etc., R. Co. vs. Tompkins, 176 U. S., 173 (44 L. ed., 420).
2 *Elliott on R. R.'s*, Section 691.

So, as we take it, the alternative provision of the writ is without effect, for the reason (1), that the facilities required to be furnished have never been defined in any proceeding directed to that end; (2), that the necessity for any additional facilities has never been determined as a basis for such provision; and, (3), that the requiring to be provided facilities substantially the same as those which would be furnished by trains Nos. 32 and 35 was the discharge of a legislative function, and, therefore, not within the scope of judicial authority. The object of the action was not to determine whether facilities were adequate at Latta, and in no sense has the railroad company had a hearing on this matter, which could only be determined in a proper proceeding to that end directed.

For these reasons we contend that this alternative provision of the writ is of no effect, and that the writ must be construed as though it merely required trains Nos. 32 and 35 to stop at Latta.

We, therefore, respectfully submit that for the reasons here stated, the judgment of the Supreme Court of South Carolina awarding the writ of mandamus was erroneous, and should be reversed.

We realize that our Brief in this case is somewhat lengthy, but we ask the indulgence of the court for having attempted to make an exhaustive examination of the authorities on a question of such vital moment to the Atlantic Coast Line Railroad Company as an interstate carrier of passengers from Florida

and the West Indies to Washington, New York, and other Northern and Eastern points.

Respectfully submitted,

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APPENDIX A.

The Railroad Commission Law of South Carolina, as Found in Volume I of the Code of Laws of South Carolina, Revision of 1902.

SECTION 2063. There shall be three Railroad Commissioners elected in accordance with the provisions hereafter contained; that is to say: they shall be elected by the present General Assembly for the term of two years, beginning with the first day of January, 1893. At the expiration of said terms they shall be succeeded by their successors in office, who shall have been elected at the next general State election. The Commissioners of Election for the several counties in the State shall at each general election herein provided for conduct the election of the Commissioners as is conducted the election of other State officers other than Governor and Lieutenant-Governor. The term of office of the Commissioners to be elected at the general election of 1894 shall be for two, four, and six years, respectively, the term of each Commissioner to be determined by lot, in the presence of the Governor. At the expiration of said terms, respectively, they shall each be succeeded by his successor in office, who shall have been elected at the general elction next preceding the date of said expiration. Said Commissioners shall take the oath of office provided by the Constitution and laws of this State for State officers, and shall not, jointly or severally, or in any way, be the holder or holders of any railroad stock or bond. The Governor shall have the power to fill vacancies in the office of Commissioner until the successor in such office for a full term or an unexpired term, as the case may be, shall have been elected at the next ensuing general election and

qualified. The salary of each Commissioner shall be twenty-one hundred dollars per annum, to be paid from the Treasury of the State.

SECTION 2064. A majority of said Commissioners shall constitute a quorum for the transaction of all business pertaining to their office. The Commissioners to be elected under the terms of this article shall be elected from the State at large: *Provided,* That any male citizen of this State above the age of twenty-five years shall be eligible to election to the position of Railroad Commissioner.

SECTION 2065. The said Commissioners shall be furnished with an office, necessary furniture and stationery, and may employ a secretary or clerk at a salary of twelve hundred dollars per annum, at the expense of the State. The office of said Commissioners shall be kept in Columbia, and all sums of money authorized to be paid by this article out of the State Treasury shall be paid only on the warrant of the Comptroller-General: *Provided,* That the total sum to be expended by said Commissioners for office rent, furniture, and stationery shall in no case exceed the sum of five hundred dollars ($500), or so much thereof as may be necessary, per annum.

SECTION 2066. The expenses of the Commissioners, including salaries and the salary of their secretary or clerk, shall be borne by the several corporations owning or operating railroads, telegraph and express companies in this State, according to their gross income proportioned to the number of miles in this State, to be apportioned by the Comptroller-General of the State, who, on or before the first day of October in each and every year, shall assess upon each of said corporations its just proportion of such expenses in proportion to its gross income for the current year ending on the thirtieth day of June preceding that on which the assessment is made; and the said assessment shall be charged up against the said corporations, respectively, under the order and direction of the Comptroller-General, and shall be collected by the several County Treasurers in the manner provided by law for the collection of taxes from such corporation, and shall be paid by the said County Treasurers as collected into the Treasury of the State, in like manner as other taxes collected by them for the State. The Commissioners and their secretary shall be transported free of charge, when in the performance of the duties of their office concerning railroads, over all railroads and railroad trains in this State, and they may take with them experts or other agents whose service they

may deem to be temporarily of importance, and they shall in like manner be transported free of charge.

SECTION 2067. The Commissioners shall have the general supervision of all railroads and railways, express and telegraph lines in this State operated by steam, and shall examine the same and keep themselves informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance of the several corporations with the provisions of their charters and the laws of the State; and to enforce the provisions of this chapter; and the provisions of this chapter shall apply to all railroads and railways, and to the corporations, trustees, receivers, or others owning or operating the same.

SECTION 2068. Whenever, in the judgment of the Railroad Commissioners, it shall appear that any such corporation has violated any law, or neglected in any respect or particular, to comply with the terms of its charter, or with the provisions of any of the laws of the State, especially in regard to the connections with other railroads, the rates of toll, and the time schedule, they shall give notice thereof in writing to such corporation, and if the violation or neglect is continued after such notice, the Commissioners shall make application to a Circuit judge, or a judge thereof in vacation, for an injunction to restrain the company complained of from further continuing to violate the law or the terms of its charter, or for a writ of mandamus, as hereinafter provided in Section 2119.

SECTION 2069. Whenever, in the judgment of the Railroad Commissioners, it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling stock, or any enlargement of, or improvement in, the stations or station houses, or any modification in the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper; and if the said company shall fail, within sixty days, to adopt the suggestions of said Commissioners, they shall take such legal proceedings as they may deem expedient, and shall have authority to call upon the Attorney-General to institute and conduct such proceedings.

SECTION 2070. Upon the complaint and application of the Mayor and Aldermen or Council of any city, town or County

Board of Commissioners of any county within which any part of any such railroad is located, it shall be the duty of the Railroad Commissioners to make an examination of the conditions and operation thereof. Before proceeding to make such examination in accordance with such application, said Commissioners shall give to the applicants and the railroad corporations reasonable notice, in writing, of the time and place of entering upon the same. If upon such examination it shall appear to the Commissioners that the complaint alleged by the applicant is well founded, they shall so adjudge, and shall inform the corporation operating such railroad of their adjudication, in the same manner as is provided in Section 2068 of this chapter; and the company failing for sixty days after such notice to remove the cause of such complaint, they shall make report thereof to the General Assembly for such action as it may deem expedient; or if there be necessity for prompt action, they may take such legal proceedings as may be proper, and the Attorney-General shall institute and conduct such proceedings.

SECTION 2071. The Railroad Commissioners shall investigate the causes of any accident on a railroad resulting in loss of life, and of any accident not so resulting, which, in their judgment, shall require investigation.

SECTION 2072. Every railroad corporation shall, at all times on request, furnish the Railroad Commissioners any information required by them concerning the condition, management, and operation of its railroads, and particularly with copies of time tables, and also with the rates of transporting freight and passengers upon its road and other roads with which its business is connected.

SECTION 2073. No request or advice of the Railroad Commissioners shall have the effect to impair, in any manner or degree, the legal duties and obligations of any railroad corporation or its liability for the consequence of its acts, or of the neglect or mismanagement of any of its agents or servants.

SECTION 2074. The Commissioners shall make an annual report to the Legislature of their official acts, including such statements, facts and explanations as will disclose the actual working of the system of railroad transportation in its bearing upon the business and prosperity of the State; and such suggestions as to the general railroad policy of the State, or as to any part thereof, or as to the condition, affairs or conduct of any of the railroad corporations, as may seem to them appropriate, with a special report of all accidents and the causes thereof for the pre-

ceding year. And they shall also recommend such legislation as in their judgment may be necessary to secure just and reasonable rates for the transportation of passengers and freights and for the prevention of unjust discrimination.

SECTION 2075. The Commissioners shall require the annual reports to be made by railroad companies in manner and form and at the time provided for herein, and shall be authorized to require reports to be made of such other matters as they may deem expedient; and they may, from time to time, make such changes as they may deem proper in the form of report herein prescribed, giving the corporations one year's notice of any such changes or additions as require any alterations in the method or form of keeping their accounts; and the Commissioners shall, on or before the first day of June in each year, furnish to the several railroads blank forms of such reports. When the report received from any corporation is defective, or probably erroneous, the Commissioners shall notify the corporation to amend the same within fifteen days. The Commissioners shall prepare such tables and abstracts of all the returns they shall deem expedient, and their annual report shall be transmitted to the Governor of the State on or before the second Monday in November in each year, to be laid before the Legislature. The originals of the report or reports, as amended, subscribed, and sworn to by the officers of the corporation, shall be preserved in the office of the Commissioners.

SECTION 2076. All contracts and agreements between railroad companies doing business in this State as to rates of freight and passenger tariffs, shall be submitted to said Commissioners for inspection and correction, that it may be seen whether or not they are a violation of the law or of the provisions of the Constitution of this chapter, or of the rules and regulations of said Commissioners; and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies doing business in this State, shall be submitted to said Commissioners for inspection and approval, in so far as they affect rules and regulations made by said Commissioners to secure to all persons doing business with said companies just and reasonable rates of freight and passenger tariff, and so far as they are affected by any of the provisions contained in this chapter for securing to all persons just, equal and reasonable facilities for the transportation of freight and passengers; and said Commissioners may make such rules and regulations as to such contracts and agreements

as may be then deemed necessary and proper; and any such agreements not approved by such Commissioners, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter, and shall be illegal and void.

If the said contracts, agreements, or arrangements shall, in the opinion of the Commissioners, in any way be in violation of any of the provisions of this chapter, the Commissioners shall forthwith notify the said railroad companies, in writing, of their objections thereto, specifying such objections; and if the said railroad companies shall fail or neglect, within five days after such notice, to amend and alter such contract, agreement, or arrangement, in a manner satisfactory to the Commissioners, the Commissioners shall thereupon call upon the Attorney-General to institute and conduct such legal proceedings as may be necessary to enforce the penalties prescribed in this chapter for such violation of its provisions.

SECTION 2077. Said Railroad Commissioners, in making any examination for the purpose of obtaining information pursuant to this chapter, shall have the power to issue subpoenas for the attendance of witnesses by such rules as they may prescribe, and said witnesses shall receive from the State Treasury for such attendance one dollar per day and five cents per mile traveled by the nearest practical route in going to and returning from the place of meeting of said Commissioners, to be ordered paid by the Comptroller-General upon presentation of subpoenas sworn to by the witnesses as to the number of days served and miles traveled, before the clerk of said Commissioners, who is hereby authorized to administer oaths. In case any person shall wilfully fail or refuse to obey such subpoena, it shall be the duty of any Circuit judge of the Court of Common Pleas and General Sessions of any county, upon application of said Commissioners, to issue an attachment for such witness and compel him to attend before the Commissioners and give his testimony upon such matters as shall be lawfully required by such Commissioners; and said Circuit judge shall have power to punish for contempt, as in other cases, of refusal to obey the process or order of the court.

SECTION 2078. Every officer, agent, or employee of any railroad company who shall wilfully neglect or refuse to make and furnish any report required by the Commissioners as necessary to the purposes of this chapter, or who shall wilfully and unlawfully hinder, delay or obstruct said Commissioners in the dis-

charge of the duties imposed upon them, shall forfeit and pay a sum of not less than one hundred dollars, nor more than one thousand dollars, for each offense, to be recovered in any action in the name of the State as provided in Section 2117.

SECTION 2079. The Commissioners may make and propound to any of the railroad companies of this State any interrogatories additional to those contained in the schedule and report hereinbefore provided, which shall be answered by such companies in the same manner.

SECTION 2080. On the application in writing of a director or of any person or persons owning one-fiftieth part of the entire paid in capital stock of any corporation operating a railroad, or the bonds or other evidences or [of] indebtedness of such corporation equal in amount to one-fiftieth part of its paid in capital stock, the Railroad Commissioners shall make an examination into the books of said corporation.

SECTION 2081. The Railroad Commissioners shall further have, at all times, access to the list of stockholders of every corporation operating a railroad, and may, in their discretion, at any time, cause the same to be copied, in whole or in part, for their own information or for the information of persons owning stock in such corporation.

SECTION 2082. It shall be the duty of said Commissioners, when necessary, to investigate so much of the books and papers of all the railroad companies doing business in this State as they may think proper, to ascertain if the rules and regulations as aforesaid have been complied with, and to make personal visitations of railroad offices, stations, and other places of business, for the purpose of examinations and to make rules and regulations concerning such examinations, which rules and regulations shall be observed and obeyed as other rules and regulations as aforesaid; said Commissioners shall also have full power and authority to examine all agents and employees of said railroad companies and other persons under oath and otherwise, in order to procure the necessary information to make just and reasonable rates of freight and passenger tariffs, and to ascertain if such rules and regulations are observed or violated, and to make necessary and proper rules and regulations concerning such examinations, and which rules and regulations herein provided for shall be obeyed and enforced as all other rules and regulations provided for in this chapter. The powers herein conferred upon the Commissioners to fix passenger and freight rates, joint and several, are hereby delegated to

them by the General Assembly as fully as the General Assembly itself could exercise them; and in arriving at their conclusions and decisions as to what are just and reasonable rates, and in making examinations for such purpose, they shall have the powers conferred in Sections 2077, 2078, 2079, and 2080, for securing the attendance of witnesses, reports and testimony of officers, agents or employees of railroad companies, and for the production of books and papers; and for violation of the provisions of this section the same penalties are hereby imposed as are provided in said sections respectively; and such witnesses shall receive the compensation prescribed in Section 2077. Said passenger rates shall not exceed those allowed by Section 2165.

SECTION 2092. The Commissioners elected as hereinbefore provided shall, as provided in the next section of this chapter, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads therein; but said passenger rates shall not exceed the maximum prescribed in Section 2165; they shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State, as to charges to any and all points for the necessary hauling and delivery of all freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in this State; shall have the power to make just and reasonable joint rates for all connecting roads doing business in this State, as to all traffic or business passing from one of said roads to another, and to require the making of such connection at intersecting points of the schedules of trains as the public convenience may in their judgment demand: *Provided, however*, That before applying joint rates to roads that are not under the management and control of one and the same company, the Commissioners shall give thirty days' notice to said roads of the joint rate contemplated, and of its division between said roads, and give hearing to roads desiring to object to the same; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroad, no matter by whom owned or carried, and shall make just and reasonable rules and regulations to be observed by said railroad companies or railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers:

Provided, That nothing in this chapter shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any railroad carrying the same are charged by such railroad, but said railroad companies shall possess the same power and right to charge such rates for carrying such freights as they possessed before the passage of this chapter, and Commissioners shall have full power, by rules and regulations, to designate and fix the differences in rates of freight and passenger transportation to be allowed for shorter and longer distances on the same or different railroads, and to ascertain what shall be the limit of longer and shorter distances.

SECTION 2668. The said Railroad Commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freight and cars on each of said railroads, and said schedule shall, in suits brought against any such railroad corporations wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all of the courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said Commissioners shall from time to time, and as often as circumstances may require, change and revise said schedule. When any schedule shall have been made or revised, it shall be the duty of all such railroad companies to post, at all their respective stations, a copy of said schedule for the protection of the people: *Provided*, That the schedules thus prepared shall not be taken as evidence as herein provided until schedules have been prepared and published as aforesaid for all the railroad companies now organized under the laws of this State, or that may be organized at the time of said publication. All such schedules purporting to be printed and published as aforesaid shall be received and held in all such suits as *prima facie* the schedules of said Commissioners without further proof that the production of the schedule desired to be used as evidence, with a certificate of the Railroad Commission that the same is a true copy of the schedule prepared by them for the railroad company or

corporation therein named, and that the same has been duly published as required by law: *Provided,* That thirty days' notice of any change or revision of the schedule of rates shall first be given to the railroad company to be affected thereby before the same shall go into effect.

Any railroad corporation which shall fail to post at any of its stations a copy of the schedule of rates as provided in this section, shall be liable to a penalty of one hundred dollars for each and every day in which it shall fail to post such schedule, to be recovered by any citizen who will sue therefor, one-half of such penalty to go to the State, the other half to the citizen suing for the same.

SECTION 2094. Power is hereby conferred on the Railroad Commission of South Carolina, and they are required to fix and prescribe a schedule of maximum rates and charges for storage of freight made and charged by railroad companies doing business in this State, and to fix at what time, after the reception of freight at place of destination, such charges of storage shall begin, with power to vary the same according to the value and character of the freight stored, the nature of the place of destination, and residence of consignee, and such other facts as in their judgment should be considered in fixing the same.

All provisions of the Act creating said Railroad Commission, and Acts amendatory thereof, prescribing the procedure of said Commission in fixing freight and passenger tariffs, and hearing complaints of carriers and shippers, and of altering and amending said tariffs, shall apply to the subject of fixing and amending rates and charges for storage, as aforesaid.

SECTION 2116. If any railroad company doing business in this State, by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said Commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said Commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars nor more than five thousand dollars, to be fixed by the presiding judge. An action for recovery of such penalty shall lie in any court in the State where such violation has occurred or wrong has been perpetrated, and shall be in the name of the State of South Carolina. The Commissioners shall

institute such action through the Attorney-General or any of the Solicitors of this State.

SECTION 2117. If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the Commissioners aforesaid, inflict wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in the county where the same is done, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in actions between individuals, except that in cases of wilful violation of law such railroad companies shall be liable to exemplary damages: *Provided*, That all suits under this chapter shall be brought within twelve months of the commission of the alleged wrong or injury.

SECTION 2119. If any railroad company shall neglect or refuse to comply with the provisions of this chapter, or with the rules and regulations prescribed by said Commissioners within the limits of their authority, such company shall be subject to a writ of *mandamus*, to be issued by any justice of the Supreme Court, or Circuit judge, upon application of the Commissioners, or a majority of them, to require compliance with said laws or said rules and regulations, and failure to comply with said writ of *mandamus* shall be punishable as for contempt; and for any wilful violation of any of said laws, or failure to comply with the requirements of such rules or regulations, the court may award such costs and counsel fees, on the return of said writs, and after due deliberation thereon, as may be just.

SECTION 2169. The Railroad Commissioners of this State are hereby invested with authority to require all railroads at junctional points in this State to erect union or other depots for the convenience and accommodation of the public; and if any railroad company shall fail or refuse so to do when required by the said Railroad Commissioners, it shall forfeit and pay a sum of not less than five thousand dollars, to be recovered in an action in any county in this State where such violation has occurred, and shall be in the name of the State of South Carolina. The Commissioners shall institute such action through the Attorney-General or any of the Solicitors of the State.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* WHARTON *et al.*, RAILROAD COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 36. Argued November 5, 1907.—Decided December 9, 1907.

Any exercise of state authority, whether made directly or through the instrumentality of a commission, which directly regulates interstate commerce is repugnant to the commerce clause of the Federal Constitution; and so held as to the stopping of interstate trains at stations within the State already adequately supplied with transportation facilities.

Whether an order stopping interstate trains at specified stations is a direct regulation of interstate commerce depends on the local facilities at those stations, and while the sufficiency of such facilities is not in itself a Federal question, it may be considered by this court for the purpose of determining whether the order does or does not regulate interstate commerce, and if, as in this case, the local facilities are adequate, the order is void.

Inability of fast interstate trains to make schedule, loss of patronage and compensation for carrying the mails, and the inability of such trains to pay expenses if additional stops are required are all matters to be considered in determining whether adequate facilities have been furnished to the stations at which the company is ordered by state authorities to stop such trains.

74 S. Car. 80, reversed.

THE railroad company, plaintiff in error, brings the case here to review a judgment of the Supreme Court of the State of

South Carolina, which granted a mandamus to compel the company to stop certain of its through trains running between Jersey City, New Jersey, and Tampa, Florida, at a station on its road called Latta, in the State of South Carolina, near the boundary line between that State and the State of North Carolina.

Upon a request filed with him by the Railroad Commission of South Carolina, the Attorney General of that State commenced these proceedings by filing a petition to obtain a mandamus directed to the company compelling it to stop trains 32 and 35 at the station mentioned, pursuant to the order made by the Railroad Commission, after a hearing had been had before it.

The company demurred to the petition, the demurrer was overruled and the company given leave to answer, which it did, setting up several defenses, among others averring that sufficient accommodations were already furnished to the citizens of Latta, and those residing along the Latta Branch Railroad; that the trains mentioned, 32 and 35, were interstate commerce trains, running between New York and Tampa, Florida, and intermediate cities, and the southbound trains were compelled to run at a high rate of speed in order to make connections with the steamers to Havana from Tampa, and so as to make the through trip as fast as possible; that the northbound trains were companion or return trains, making an equally fast schedule time; that to stop them at stations like Latta would result in rendering it impossible for them to make schedule time and they would have to be abandoned as through fast trains; that they carried the United States mail and their trains were made up very largely of through passengers; that there were two competitors for this through travel, and that it would be impossible to keep up the trains in competition with these other railroads if stops were to be made other than those absolutely necessary. The answer also averred that in addition to a number of passenger trains of local character daily, there was also furnished the citizens of Latta the con-

venience of a daily passenger train each way for through travel north and south other than trains 32 and 35, and it was averred that the order of the Railroad Commission of South Carolina was unreasonable and unnecessary, a direct burden upon interstate commerce, and therefore a violation of and in conflict with § 8 of Art. I of the Constitution of the United States, giving Congress the power to regulate commerce.

On the coming in of this answer an order was made referring all issues involved to a referee to take testimony thereon and report back as soon as convenient. Pursuant to such order evidence was taken before a referee and report made thereon to the Supreme Court, which decided that sufficient accommodations were not furnished to the citizens of Latta and along the Latta Branch Railroad by the plaintiff in error at its station in Latta; and the court thereupon made an order that the passenger trains 32 and 35 should stop when flagged at the Latta station, for the purpose of receiving and delivering passengers at that station, "with the alternative right on your part to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag."

The testimony upon which this order was made is in the record and is substantially uncontradicted. It appears from that testimony that Latta is a small station in the State of South Carolina, near the northern boundary of the State, and on the road of the plaintiff in error, having a population, according to the last United States Census, of 453. Clio is another small settlement in the same State, about twenty miles northwest of Latta, on what is termed the Latta Branch Railroad, having a population of 508, by the same census. Dunbar is a station between Latta and Clio, with a population according to the same census, of 115. The country back of these stations is said to be a somewhat thickly settled agricultural country. It is also said by witnesses for Latta that these places have increased somewhat in population since the last census.

In addition to several local trains passing through Latta

for stations along this road, or to and from Clio, there was one daily through train each way (Nos. 39 and 40), stopping at this station, and which carried passengers through to New York or Florida and intermediate stations, and they were equipped with first and second class cars, through Pullman sleepers, mail, express and baggage cars. The only objection to them was their want of speed; that they stopped so frequently they did not arrive at their destination as swiftly as trains 32 and 35. In addition, trains 32 and 35 could be boarded at Florence, a station on the same road, distant about 15 or 20 miles south from Latta, or at Dillon, a station about 7 miles from Latta. The objection made by the people of Latta to this mode of getting these trains was that if they were going north they rode south from Latta to Florence, and then boarded the train and went directly back over the same road from Florence to Latta, which they would not have to do if the train stopped at Latta. It also involved an additional cost of $1.42 above the price of a ticket from Latta to New York. If they preferred to take the train northbound at Dillon instead of Florence, then they had to drive from Latta to Dillon over what was described by a witness to be in winter "one of the worst roads that ever was made a road." It was also averred that by stopping the southbound train (No. 35) at Latta it could be there taken at 3 o'clock in the morning instead of going to Florence the night before and taking the train there at 4 o'clock A. M. the next day, and a close connection could also be made at Florence with Columbia (on a branch road), by taking train 35 at Latta at 3 A. M., so that a citizen could go to Columbia and return to Latta the same day, thus saving a hotel bill, which now had to be paid, as connections were so made that the journey could not be accomplished in one day. The people at Clio, and the other stations on the Latta Branch Railroad, were accommodated so that they could ride to Latta in time to have substantially the same conveniences in getting away from that station that the people living there had. The distance from Jersey City to Tampa is about twelve hundred miles, and the trains

32 and 35 are among the fastest and longest continuous trains in the whole country, exceeding the distance from New York to Chicago. These trains rank with the very best trains run anywhere. They are placed on the road for the convenience of through travel, and could not be profitably run if they were slower trains.

Mr. P. A. Willcox and *Mr. Frederic D. McKenney*, with whom *Mr. Alexander Hamilton*, *Mr. George B. Elliott*, *Mr. F. L. Willcox* and *Mr. Henry E. Davis* were on the brief, for plaintiff in error:

The State has no power or authority to interfere in other than police matters with fast mail and passenger trains engaged wholly in interstate commerce. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Hannibal &c. R. R. Co.* v. *Husen*, 95 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby County*, 120 U. S. 489.

Even if adequate local railroad facilities are not furnished, a State has no power and authority to compel the furnishing of such facilities by requiring fast mail and passenger trains engaged wholly in interstate commerce to make the stops, but it can only compel additional local trains to be furnished. *Tiernan* v. *Rinker*, 102 U. S. 123; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Wabash Railroad Co.* v. *Illinois*, 118 U. S. 557; *State Freight Tax Case*, 15 Wall. 232; *Welton* v. *Missouri*, 91 U. S. 275; *Brown* v. *Houston*, 114 U. S. 622; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Mississippi Railroad Commission* v. *Illinois Central Railroad Co.*, 203 U. S. 335; *Hall* v. *DeCuir*, 95 U. S. 485. See also *Crandal* v. *Nevada*, 6 Wall. 35; *Hannibal &c. R. Co.* v. *Husen*, 95 U. S. 465; *Mobile County* v. *Kimball*, 102 U. S. 691; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 23; *Wabash Railroad Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Bowman* v. *Chicago & Northwestern Railroad Co.*, 125 U. S. 465; *Covington & Cincinnati Bridge Co.*

v. *Kentucky*, 154 U. S. 204; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

The facilities provided were adequate and it would be unreasonable to require the company to convert these two fast interstate trains into local trains and to compel plaintiff in error to stop these two trains at Latta.

Mr. M. C. Woods, with whom *Mr. J. Fraser Lyon*, Attorney General of the State of South Carolina, was on the brief, for defendants in error:

The regulation of the accommodations afforded the traveling public is a police regulation. *Gladson* v. *Minnesota*, 193 U. S. 53; *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335.

The Supreme Court of South Carolina was warranted in deducing from the holdings of this court that the primary duty of even an interstate railroad is to its local territory, and the secondary duty is to interstate traffic. *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335; *Lake Shore Co.* v. *Ohio*, 173 U. S. 285; *C. C. C. & St. L. R. R. Co.* v. *Illinois*, 177 U. S. 514. *Illinois Central R. R.* v. *Illinois*, 163 U. S. 142, discussed and distinguished.

The fact at issue having been determined by a tribunal of competent jurisdiction from which no appeal was taken, the Supreme Court of South Carolina would have been warranted in granting a peremptory writ of mandamus, as prayed for in the complaint, this being one of the instances in which this court has held that state authority may stop interstate trains.

The Supreme Court of South Carolina having granted to the railroad company the alternative of providing facilities substantially the same as those which would result from the stopping of trains 32 and 35 at Latta, the fault is with the plaintiff in error for failure to avail itself of this privilege, and therefore there has been no burden, direct or indirect, placed, by the court's action, upon interstate commerce.